



**Abira v Okech (Environmental and Land Originating Summons  
E006 of 2020) [2024] KEELC 233 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 233 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2020**

**E ASATI, J**

**JANUARY 25, 2024**

**BETWEEN**

**WILLIAM BODO ABIRA ..... APPLICANT**

**AND**

**MARTIN OTIENO OKECH ..... RESPONDENT**

**JUDGMENT**

1. Vide the Originating Summons dated 21<sup>st</sup> September, 2020, William Bodo Abira, the Plaintiff/Applicant who claims to be entitled to be declared as proprietor of 1.10 Ha of land parcel number Kisumu/Kogony/2599 by virtue of Adverse possession sought the court to determine and order that;
  - a. the Plaintiff/Applicant be declared the proprietor of 0.48 Ha parcel of land No. Kisumu/Kogony/2599 which he has occupied openly exclusively, continuously and without interruption from 2003 to date for a period of over 16 years.
  - b. That the applicant has acquired a bona fide title to 0.48 Ha of land parcel number Kisumu/Kogony/2699 by adverse possession.
  - c. The applicant is entitled to be registered as the proprietor of 0.48 Ha of land No. Kisumu/Kogony/2599.
  - d. The Defendant be ordered to transfer 0.48Ha the whole of the said parcel No. Kisumu/Kogony/2599.
  - e. In default of the Defendant to transfer the said parcel to the applicant, the Deputy Registrar to execute the necessary documents to effect the transfer of ownership of 0.48Ha of land parcel number Kisumu/Kogony/2599 from the Respondent to the Applicant.
  - f. The Defendant be restrained from entering, wasting, damaging and/or in any way alienating 0.48Ha of land parcel number Kisumu/Kogony/2599



- g. The costs of the suit be awarded to the Plaintiff/Applicant.
2. The grounds upon which the Originating Summons was based are that the Plaintiff entered onto the suit land in the year 1980. That the suit land is registered in the name of the Respondent. That the Plaintiff has been in quiet exclusive possession and occupation of the said portion of land in its entirety for a period exceeding 40 years to date and has therefore acquired title by adverse possession. That the said occupation and use has been continuous and in the Defendant's knowledge hence the Plaintiff is entitled to be registered as proprietor of Kisumu/Kogony/2599.
  3. The Originating Summons was supported by the averments in the Supporting Affidavit sworn by the Plaintiff on 24<sup>th</sup> September, 2020 and the annexures thereto.
  4. The suit was undefended.
  5. Vide the Notice of Motion dated 24<sup>th</sup> February, 2021, the applicant sought for leave to serve all court process in the suit upon the Respondent/Defendant by way of substituted service because, according to the applicant, the Defendant could not be traced for purposes of service. The court record shows that the application was allowed vide court order dated 31<sup>st</sup> January, 2022. Affidavit of Service sworn by Maxwel Bagada Advocate on 4<sup>th</sup> October, 2022 shows that the Defendant was served vide advertisement. A copy of the advertisement was attached to the Affidavit. Affidavit of Service sworn 14<sup>th</sup> April, 2023 by the same deponent shows that the Respondent was subsequently served with Mention Notice. The Respondent did not respond to the Plaintiff's claim in any way. The matter therefore proceeded to hearing in his absence.

### **The Evidence**

6. The Plaintiff's evidence in the matter was comprised of his sworn testimony, the documents he produced as exhibits and the testimonies of PW2 and PW3.
7. The Plaintiff stated vide his Supporting Affidavit filed on 4<sup>th</sup> May, 2023 which was adopted as his evidence-in-chief that in the year 1980, he moved into land parcel number Kisumu/Kogony/2599 and constructed his house thereon comprising of a permanent house where he lives with his family. That there is a total of five (5) houses on the suit land belonging to the Plaintiff and his son That he has cultivated crops and planted trees on the land. That he buried his 3 daughters who passed away on the land. That part of the land has stones which he uses for purposes of sale for quarrying. That he has enjoyed exclusive, uninterrupted occupation and use of the suit land since the year 1980.
8. The Plaintiff produced a valuation report, green card and certificate of official search in respect of the suit land and photographs as exhibits.
9. PW2 Joseph Owiti Ooga testified and stated vide his witness statement dated 27<sup>th</sup> April, 2023 that he knows the Plaintiff because they come from the same village. That he knows the suit land and that the Plaintiff has been in occupation thereof since the year 1980. That the occupation and use has been open, uninterrupted and peaceful. That he has never seen the Defendant on the suit land.

### **Submissions**

10. At the close of the evidence, Counsel for the Plaintiff filed written submissions on the case dated 24<sup>th</sup> October, 2023. Counsel relied on the provisions of Section 7 and 17 of the *Limitation of Actions Act* and the case of Kisumu ELC Application No. 44 of 2018 (OS) *Manason Ogando Afwanda -vs- Alice Awiti Orenge & Another* (2020) eKLR to submit that the Plaintiff has satisfied all the ingredients of



adverse possession namely open, continuous, exclusive and notorious use of the property and actual possession of the property.

### **Issues for Determination**

11. From the pleadings filed, the evidence adduced and submissions made, the sole issue that emerges for determination is whether or not the Plaintiff has acquired title to the suit land by adverse possession.

### **Analysis and Determination**

12. Though the suit was undefended, the Plaintiff had the burden to prove his claim on a balance of probabilities in accordance with the law as required under sections 107(1), 108 and 109 of the Evidence Act.
13. In the case of Charter House Bank Limited (Under Statutory management -vs- Frank N. Kamau [2016] eKLR the Court of Appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

14. The evidence of the Plaintiff was uncontroverted. The green card produced as exhibit shows that the suit land was registered in the name of the Defendant on 7<sup>th</sup> July, 2001 upon transfer. The Plaintiff’s case is that he entered the suit land in the year 1980. This means that as at the time of registration of the suit land in favour of the Defendant, the Plaintiff was already on the land.
15. Although the basis of the applicant’s entry onto the suit land in the year 1980 is not disclosed, his evidence and that of his witnesses was that he has had open, exclusive, peaceful, uninterrupted and actual occupation and use of the suit land since then. The ground survey report dated 28<sup>th</sup> April, 2023 by Beacon Point Surveys showed that on the suit land there was a homestead belonging to the Plaintiff, that there is cultivation of maize and beans on the portion outside the homestead. The photographs produced as exhibits also show the activities on the suit land.
16. On the size of the suit land, although on the 1<sup>st</sup> paragraph of the Originating Summons, the size is indicated to be 1.10 Ha and in the prayers of the Originating Summons as 0.48 Ha, both the copy of the register (green card) and the certificate of official search show that the entire of suit land measures 0.48 Ha.
17. The cause of action to remove the Plaintiff from the suit land and assert his rights thereon as registered owner accrued to the Defendant when he became registered owner thereof in the year 2001. He however, did not do so and as at the time of filing the suit on 6<sup>th</sup> October, 2020, a period of about 19



years had elapsed from the time the cause of action accrued. Section 7 of the [Limitation of actions Act](#) on which the Originating Summons herein is grounded 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.”

18. In the case of [Mtana Lewa –vs- Kabindi Ngala Mwagandi](#) [2015] eKLR 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 owner.”

19. In Kisumu Civil Appeal No. 27 of 2013, [Samuel Kibamba vrs Mary Mbaisi](#) (2015) eKLR the Court of Appeal held that:

“Strictly for one to succeed in a claim of adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without license or permission of the land owner with the intention to have the land. There must be an apparent disposition of the owner. These elements are contained in the Latin Phraseology, *nec vi, nec clam nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”.

20. Also the Court of Appeal of Kenya in the case of [Kasuve –vs- Mwaani Investments Ltd & 4 others](#) [2004] 1 KLR 184. Held that

“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition.”

21. Guided by the foregoing authorities and on the basis of the evidence placed before court, the court finds that the applicant has met the threshold for obtaining title adverse possession. The court further finds that the Respondent who is the registered owner has been dispossessed of the suit land for a period of over 19 years and that by this reason his title has been extinguished by effluxion of time.

22. In conclusion the court finds that the plaintiff has proved his case on a balance of probabilities and enters judgement in his favour for:

- a. A declaration that the Plaintiff has acquired title to land parcel No. Kisumu/Kogony/2599 measuring approximately 0.48 Ha by adverse possession.
- b. A declaration that the Defendant’s title to the suit land has been extinguished by operation of law.
- c. An order for transfer of the suit land by the Defendant in favour of the Plaintiff failing which the Deputy Registrar to execute the necessary documents to effect the transfer.



- d. An order restraining the Defendant from entering onto, wasting, damaging and/or in any way alienating land parcel No. Kisumu/kogony/2599.
- e. Each party to bear own costs of the suit.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

.....

**E. ASATI**

**JUDGE**

In the presence of:

Maureen: Court Assistant.

No appearance for the Applicant.

No appearance for the Respondent.

