



Oduor (Suing as the personal administrator of the Estate of Lucas Oduor Osowo - Deceased) v Odhiambo & another (Environment & Land Case E005 of 2021) [2024] KEELC 1061 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E005 OF 2021
AY KOROSS, J
FEBRUARY 29, 2024**

BETWEEN

DENNIS OMONDI ODUOR (SUING AS THE PERSONAL ADMINISTRATOR OF THE ESTATE OF LUCAS ODUOR OSOWO - DECEASED) PLAINTIFF

AND

JOSEPHINE ADHIAMBO OJODE 1ST DEFENDANT

EMMA AUMA ODHIAMBO 2ND DEFENDANT

JUDGMENT

Background of the case

1. This suit is instituted by an amended originating summons (amended OS) dated 29/04/2023 brought pursuant to the provisions of Section 38 of the *Limitation of Actions Act* and Order 37 Rule 7 of the *Civil Procedure Rules*. The amended OS is supported by the affidavit of Dennis Omondi Oduor (Dennis) which he deposed on even date.
2. Lucas Oduor Osowo (Lucas) who is the initial plaintiff died on 5/06/2022 and he is substituted by Dennis. The 1st defendant is the registered owner of North Ugenya Karadolo 2232 (suit property) while the 2nd defendant is an alleged purchaser.

Plaintiff's case

3. It is the plaintiff's case that he has allegedly acquired by adverse possession the suit property which is a subdivision of Siaya/Karadolo 770 (mother parcel) which itself has severally been subdivided resting with the suit property. The plaintiff contends he has been in exclusive occupation of the suit property which measures approximately 0.80 ha.



4. Accordingly, the plaintiff raises the following issues for this court's determination: -
 - a. Whether this court should declare that Lucas has acquired the suit property by adverse possession.
 - b. Whether this court should order the defendant to execute all relevant conveyance documents pertaining to the suit property in favour of Lucas, and in default, the deputy registrar to so do.
 - c. Whether this court should declare the 1st defendant holds the suit property in trust for Lucas.
 - d. Whether this court should issue an order of permanent injunction restraining the defendants, their agents, servants, employees and/or agents howsoever acting from selling, transferring, disposing, developing, constructing on, charging, trespassing or in any way interfering with the plaintiff's quiet possession and enjoyment of the suit property.
 - e. Whether the defendant should be ordered to pay damages for trespass and costs of the suit.
5. Despite service, the defendants did not file any documents in opposition to the plaintiff's claim and the suit proceeded as an undefended claim.

Plaintiff's evidence

6. The plaintiff testified as PW1 and his evidence is composed of his oral testimony, affidavits and documents he produced in support of his case. It is his testimony that Lucas has since 1994, been in occupation of the suit property which is a subdivision of the mother parcel that was initially registered in the name of Domnicus Odhiambo Odhiambo (Domnicus) and upon Domnicus's demise, it was registered in the 1st defendant's name.
7. The plaintiff avers that upon Lucas's entry into the suit property, he constructed a home upon it and occupied it together with his family continuously, uninterrupted, openly and without permission of either Domnicus or the 1st defendant for a period of 23 years to the time of filing suit hence the claim of adverse possession is ripe.
8. The plaintiff contends that notwithstanding the 1st defendant being privy of Lucas's occupancy, she went ahead and sold a portion of the suit property to the 2nd defendant who has since fenced off this portion, constructed a toilet thereupon and even intends to put up a home on it.

Plaintiff's submissions

9. After closing the plaintiff and defence cases, the plaintiff's counsel on record M/s Ouma Njoga & Company filed their written submissions dated 6/11/2023. Counsel adopted the issues contained in the amended OS that were earlier highlighted in this judgment as the issues arising for resolution.
10. On issues (a) and (c) and relying on Sections 7, 13 and 38 of the *Limitation of Actions Act* and several authorities including the Court of Appeal decision of *Mtana Lewa v Kabindi Ngala* (2015) eKLR, counsel submits the plaintiff has met the ingredients of adverse possession. In this decision, the court expressed itself as follows: -

“The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”



11. On issue (d), counsel submits that if the court finds Lucas has proved his claim of adverse possession, the court should grant him the order of permanent injunction since the suit property has been sold to the 2nd defendant and to buttress his position, counsel relies on the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR where the persuasive decision stated: -

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

12. On issue (e), counsel submits that the plaintiff having satisfied the ingredients of adverse possession, the defendants are nothing but trespassers and since trespass is actionable per se, the plaintiff is entitled to general damages to be assessed at Ksh. 500,000/-. Counsel relies on the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR. Counsel seeks for costs of the suit.

Issues for determination, Analysis and Determination

13. I have considered the pleadings, evidence adduced by the plaintiff, as well as the plaintiff's counsel's submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and the issues for determination are: -

- I. Whether the plaintiff's suit is competent against the 2nd defendant.
- II. Whether the plaintiff proved his claim of adverse possession against the 1st defendant.
- III. What appropriate orders should be granted.

I. Whether the plaintiff's suit is competent against the 2nd defendant

14. It is settled law a claim of adverse possession is only maintainable against the registered proprietor of a suit property or the administrators of his estate. I adopt the decision of the Court of Appeal in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR which stated thus in its obiter: -

“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner.”

15. The 2nd defendant is not the registered owner of the suit property and I find and hold the suit against her is incompetent and a nullity. Consequently, I hereby strike out the suit against her.

II. Whether the plaintiff proved his claim of adverse possession against the 1st defendant.

16. The common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act* and it is one of the ways of acquiring land in Kenya.
17. The relevant provisions are underpinned in Sections 7, 13 and 38 thereof and from these provisions of law and settled case law, the onus is on the plaintiff who claims adverse possession to prove that he is an intruder, he has been in unlawful occupation for a period of over 12 years to the time of filing suit, the claim is against the registered owner, show clear and unequivocal evidence that he has dispossessed the owner or the owner has discontinued possession in a manner that is without permission and



his occupation is, with the knowledge of the true owner, without secrecy, without evasion and in continuous occupation of a determinable portion of the suit property. See *Mtana Lewa v Kabindi Ngala* (*Supra*) and *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] eKLR.

18. As rightfully submitted by the plaintiff's counsel, adverse possession is a matter of fact to be observed on the land. See *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR. Even if the plaintiff's claim is undefended, the onus was on him to prove his case.
19. In contending his claim of adverse possession, the plaintiff produced photographs which depicted a traditional hat, a modern house with an outdoor latrine, mature trees, crops and a fence all ostensibly existing on the suit property.
20. The ground report prepared by Opiyo & Associates which firm is allegedly a licenced land surveyor and produced by the plaintiff confirms the plaintiff occupies a portion of the suit property with a portion thereof having been fenced off allegedly by the 1st defendant who intended to dispose it off.
21. Be that as it may, even if from adduced evidence the plaintiff is undoubtedly in occupation in a manner that is open, his occupation is not enough for him to be deemed an adverse possessor because he needed to prove not one but all elements of adverse possession.
22. On the 1st, 2nd and 3rd elements of accrual of time, permission and dispossession or discontinued possession by the registered owner, PW1 asserts time started to accrue in 1994 which is the date he entered the suit property without permission.
23. However, the ground report paints a contrary picture and it asserts that even if the plaintiff entered the suit property before the year 2000, in the year 2000, the suit property was gifted to him by Domnicus. This report states in verbatim as follows: -

“The plot is occupied by Mr. Lucas Oduor Osowo he has been in occupation since before 2000 (sic) This parcel of land was gifted to him by his uncle Domnicus Odhiambo Odhiambo in the year 2000. He set up a Luo traditional (sic) home on the parcel...”

24. Hence, notwithstanding the plaintiff entered the suit property in 1994 which is prior to 2000 as the ground report alludes, time ceased to run when he was gifted the suit property in 2000 and time could only cease running upon termination of gifting by Domnicus.
25. The plaintiff could not make a claim of adverse possession while well knowing the property is a gift. Put another way, he never entered the suit property with the aim of dispossessing Domnicus. The Court of Appeal arrived at this position in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR as follows: -

“Comparatively, the Supreme Court of India in *Mohan Lal -v- irza Abdul Gaffar*, 1996, 1 SCC 639 ... Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant ...”



26. In this decision, the court went further and stated: -

“We further note that the appellant’s entry into the suit property was by permission from a person who had no proprietary interest in the parcel. ...Having entered the suit property on permission, the appellant cannot be allowed to turn around and state that that entry was by way of adverse possession...”

27. Even if it is possible for permission by gifting to have ceased upon Domnicus’s demise, which as evidenced by the greencard Domnicus is allegedly deceased, PW1 had the onus of proving when Domnicus died. However, he did not lead any evidence as to when he died and in the absence of proving termination of the suit property’s gifting, I find that time for purposes of adverse possession has never accrued and the plaintiff is in occupation by permission.

28. On the 4th element of occupancy of a defined portion, notwithstanding it is undisputed the plaintiff is in occupation, in his amended OS, he sought to be declared to have acquired the entire suit property by adverse possession.

29. However, from the ground report and PW1’s testimony, it is evident either a stranger or the 1st defendant has taken possession of a portion of it, fenced it off, built a toilet and has even kept building materials on the suit property. The ground report lends credence by maintaining: -

“...the blue line shows the fenced portion allegedly to be sold by Emma Auma Odhiambo.”

30. Thus, on the basis the plaintiff is not in exclusive possession, I find the plaintiff fails on this limb and on this, I place reliance on the case of *Gatimu Kinguru vs Muya Gathangi* [1976] KLR 253 where the court observed that:

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”

31. Further, this interruption brings into fore the 5th element of interruption of continuous occupation. Had this court not earlier found that time had not accrued and if the period of 12 years had accrued, such entry by the 1st defendant or 3rd party who had an interest in the suit property would have interrupted time. I adopt the persuasive decision of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR which stated thus: -

“Possession may be interrupted (a) by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption;”

32. Accordingly, in view of contradictions in the plaintiff’s evidence, this court finds PW1’s evidence is not consistent. The ground report demonstrates the plaintiff entered the suit property with permission yet the plaintiff testified otherwise.

33. Before I pen off, it is noted it is strange the plaintiff is describing the defendants as trespassers more so the 1st defendant who is the registered proprietor and seeks general damages against him, yet cases of adverse possession arise from claims by trespassers who desire to be registered as owners of land. In other words, it is the plaintiff who is the trespasser and not the defendants.

34. To this end, this court ultimately finds the plaintiff did not discharge his burden of proving his claim to the required standards on a balance of probabilities. Utmost, the court finds and holds the plaintiff’s



claim as contained in the amended OS dated 29/04/2023 is not merited and the same is hereby dismissed in entirety. It is trite law costs follow the event and since the claim is undefended, the plaintiff shall bear his own costs. Accordingly, I hereby issue the following final disposal orders;

- a. The plaintiff's suit against the 2nd defendant is hereby struck out.
- b. The plaintiff's suit against the 1st defendant is hereby dismissed.
- c. The plaintiff shall bear his own costs of this suit.

35 Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 29^H DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

29/02/2024

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Ouma Njoga for the Plaintiff

N/A for the defendants

Court assistant: Mr. Ishmael Orwa.

