



Ogada v Mbaga (Being Sued as the Administrator of the Estate of the Late Lukas Mbaga Okore); Lukas & 3 others (Interested Parties) (Environmental and Land Originating Summons E009 of 2022) [2024] KEELC 731 (KLR) (19 February 2024) (Judgment)

Neutral citation: [2024] KEELC 731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022
SO OKONG'O, J
FEBRUARY 19, 2024**

BETWEEN

APOLLO AYUYO OGADA APPLICANT

AND

FRANCIS OTIENO MBAGA (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE LUKAS MBAGA OKORE) RESPONDENT

AND

JENIFA NYAMUNGU LUKAS INTERESTED PARTY

SAMUEL OMONDI MBAGA INTERESTED PARTY

AYUB OWINO MBAGA INTERESTED PARTY

RUTH LOICE OKUMU INTERESTED PARTY

JUDGMENT

The Pleadings

1. By an Originating Summons dated 4th April 2022, the Applicant who claimed to have acquired the ownership of all that parcel of land known as Kisumu/Marera/1193 (hereinafter referred to as “the suit property”) by adverse possession sought the determination of the following questions;
 1. Whether the Applicant had been in actual, hostile, open, continuous and uninterrupted possession of the suit property for over 12 years.
 2. Whether the Applicant had an overriding interest under Section 28(1) of the [Land Registration Act](#), 2012 over the suit property.



3. Whether the rights of the Respondent as the administrator of the estate of Lukas Mbaga Okore, deceased (hereinafter referred to only as “the deceased”) who was the registered owner of the suit property had been extinguished by operation of law.
 4. Whether the rights of the Interested Parties as the beneficiaries of the estate of Lukas Mbaga Okore, deceased (the deceased) who was the registered owner of the suit property had been extinguished by operation of law.
 5. Whether the right of the Respondent and the Interested Parties to recover the suit property from the applicant was time-barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 6. Whether Applicant should be declared the owner of the suit property and registered as such.
 7. Whether the Respondent should be ordered to transfer the whole of the suit property to the Applicant and in default the Deputy Registrar of the court be authorised to sign the transfer on his behalf to facilitate the registration of the suit property in the name of the Applicant.
 8. Whether the Applicant was entitled to the costs of the application.
2. The application was based on the grounds set out in the Applicant’s affidavit sworn on 7th April 2022. The Applicant averred that the suit property was registered in the name of Lukas Mbaga Okore, deceased (the deceased). The Applicant averred that the suit property was erroneously registered in the name of the deceased since the same belonged to one, Teresia Ayieko Ayoo (hereinafter referred to only as “Ayoo”). The Applicant averred that he was given the suit property by Ayoo and that he had been in actual occupation, possession and use of the property since 2000. The Applicant averred that his occupation and use of the property had been open, continuous and uninterrupted since 2000. The Applicant averred that he had put up his homestead on the suit property. The Applicant averred that in 2005, the deceased and one, George Okumu Mbaga tried to interfere with his occupation of the suit property by cutting down the crops that he had planted on the property and he had them arrested, charged, convicted, and sentenced in Maseno Principal Magistrate’s Court Criminal Case No. 294 of 2005. The Applicant averred that after his conviction and sentencing as aforesaid, the deceased never interfered again with his occupation and use of the suit property. The Applicant averred that due to his open and uninterrupted occupation and use of the suit property, he had acquired the same by adverse possession. The Applicant averred that he was entitled to be registered as the owner of the suit property.
 3. The Applicant annexed to his affidavit in support of the application among others, a certificate of official search in respect of the suit property, a copy of Grant of Letters of Administration in respect of the estate of the deceased, Lukas Mbaga Okore, and the proceedings of Maseno SRM’s Criminal Case No. 294 of 2005.
 4. The Originating Summons was opposed by the Respondent and the Interested Parties through a replying affidavit sworn by the Respondent on 27th May 2022. The Respondent admitted that he was the administrator of the estate of the deceased and that the deceased was the registered owner of the suit property. The Respondent averred that the deceased was the first registered owner of the suit property. The Respondent denied that the suit property belonged to Ayoo. The Respondent averred that on various occasions before the death of the deceased and thereafter, the Applicant had trespassed on the suit property. The Respondent admitted that the deceased was arrested and charged for destroying the Applicant’s crops on the suit property. The Respondent averred that the deceased did not trespass on the suit property because the property belonged to him. The Respondent averred that the Applicant stopped trespassing on the suit property and only resumed when the Respondent filed a petition for Grant of Letters of Administration in respect of the estate of the deceased. The



Respondent averred that he had been in possession of the suit property since 2008. The Respondent averred that in March 2010, his son attempted to cultivate the land but was met with hostility from the Applicant. The Respondent averred that the Applicant's occupation of the suit property was interrupted. The Respondent averred that the Applicant was not entitled to the orders sought in the Originating Summons.

The evidence and submissions

5. At the trial, the Applicant stated as follows: He sued the Respondent and the Interested Parties because he discovered that they were doing succession in respect of the estate of the deceased that touched on part of the land that he was occupying. He was occupying part of Title No. Kisumu/Marera/ 1194, and part of Title No. Kisumu/Marera/ 1193(the suit property) which was the subject of the said succession proceedings. The portion of the suit property that he was occupying measured 1/8 of an acre and that this was the parcel of land that he was claiming by adverse possession. The said portion of land formed part of his homestead. He set up his homestead in 2000 and as such he had occupied the said portion of the suit property since then. It was Ayoo who invited him to occupy the land on which he had set up his homestead. His homestead was fenced and that the fenced area included the 1/8 of an acre portion of the suit property he was claiming. He had no claim against the Interested Parties.
6. In addition to his oral testimony, the Applicant adopted his witness statement that was filed together with the Originating Summons as part of his evidence in chief. The Applicant produced the documents attached to his bundle of documents dated 4th April 2022 as exhibits in support of his case. He urged the court to grant the reliefs sought in the Originating Summons.
7. On cross-examination, the Applicant stated that he learnt in 2005 that the suit property was registered in the name of the deceased. He stated that it was in that year that Ayoo filed a suit against the deceased at the Land Disputes Tribunal which suit was determined by the tribunal in favour of Ayoo. The Applicant stated that Ayoo died in 2006 before the tribunal order in her favour was executed. He stated that Ayoo instituted the tribunal case against the deceased after the Criminal Case at Maseno in which they were advised to pursue the land claim in an appropriate forum. He stated that he was only claiming the portion of the suit property which he was occupying.
8. The Respondent gave evidence on his own behalf and on behalf of the Interested Parties. The Respondent adopted his replying affidavit to the Originating Summons as part of his evidence in chief. He produced the documents attached to the said affidavit as exhibits in support of their defence. He stated that the Applicant came to the scene in 2002 when he (the Respondent) had a project of planting trees on the suit property. He stated that Ayoo gave the Applicant a small portion of her land, Title No. Kisumu/Marera/1194 to occupy. He stated that the Applicant then started extending the boundaries of his land towards the suit property. He stated that in that endeavour, the Applicant dug a pit latrine and planted bananas on the suit property. He stated that they brought down the pit latrine and cut down the Applicant's said banana trees in 2005. He stated that that was what led to the Maseno Criminal Case. He stated that after the Criminal Case, they started looking for the title deed for the suit property while the Applicant continued to use the disputed portion of the suit property. He stated that the Applicant planted trees on a portion of the suit property and dug soil from the other portion which he used to make bricks. He stated that the Applicant was occupying a portion of the suit property measuring about ¼ of an acre. He stated that the deceased died in 2019. On cross-examination, the Respondent denied that the deceased grabbed the suit property from Ayoo.



Survey

9. After the close of evidence, the court made an order by consent of the parties allowing the Respondent to survey the suit property to ascertain the extent to which the Applicant's homestead had encroached onto the suit property from Title No. Kisumu/Marera/1194 or its subdivisions and for the survey to be filed in court within 30 days from the date of the order. The Applicant was given the liberty to be present during the survey with a surveyor of his choice.
10. Following that order, a survey of the suit property was conducted on 22nd February 2023 by Geoffrey Mbok, Land Surveyor, Kisumu County. The surveyor filed his report in court on 24th February 2023.

The Applicant's submissions

11. The Applicant filed his submissions on 22nd June 2023. The Applicant submitted that the fact that the Applicant had been in hostile, uninterrupted occupation and use of the suit property was admitted by the Respondent and confirmed by the Surveyor's report dated 23rd February 2023. The Applicant submitted that the Respondent's allegation that the Applicant's occupation of the suit property was interrupted between 2008 and 2010 was not proved. The Applicant submitted that the time started running in his favour for the purposes of *Limitation of Actions Act*, Chapter 22 Laws of Kenya from 2000. The Applicant submitted that he had been in occupation of the suit property for 12 years as at the time he brought the suit. The Applicant submitted that he had acquired the suit property by adverse possession. The Applicant cited *Mtana Lewa v. Kabindi Ngala Mwangandi* [2015] eKLR, *Wambugu v. Njuguna* [1983] KLR 172, and *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR for the definition and elements of adverse possession. The Applicant submitted that he had proved that his occupation of the suit property was open and peaceful. The Applicant averred that although the Respondent was aware of his rights over the suit property, he failed to assert his said rights. The Applicant submitted that the destruction of the Applicant's crops on the suit property in 2005 that led to the arrest, charging and conviction of the deceased at the Maseno Law Court was a criminal offense and as such the same did not amount to assertion of a right to property by a land owner. The Applicant submitted that the survey report that was filed in court by the Respondent's surveyor confirmed that the Applicant was in possession of the whole of the suit property and that he had even sold a portion thereof to a third party. The Applicant submitted that he had established that he had been in continuous and uninterrupted possession of the suit property from 2000 and that the only instance when his occupation was interrupted was when the deceased illegally and forcefully entered the suit property and destroyed his crop in 2005. The Applicant cited *Abulitsa v. Albert Abulitsa*, Kakamega HCCC No. 86 of 2005 and submitted that for there to be interruption of time, the proprietor of land must evict or eject the trespasser and since eviction is not always possible without a breach of the peace, it is only the institution of a suit against the trespasser that interrupts and stops time from running.
12. The Applicant submitted that he had sufficiently proved all the various elements necessary for adverse possession and urged the court find that he had acquired the suit property by adverse possession and should be registered as the owner of the property in place of the deceased.

The Respondent's submissions

13. When the matter came up for mention on 26th September 2023, the advocate for the Respondent and the Interested Parties informed the court that he had filed submissions on behalf of the Respondent and the Interested Parties. As at the time of writing this judgment, the court had not seen on record the Respondent's and the Interested Parties' submissions. The court will take it that no such submissions were filed.



Analysis and determination

14. I have considered the pleadings, the evidence tendered and the submissions filed by the advocates for the Applicant. The Applicant's claim being that of adverse possession, the issues that arise for determination in my view are; whether the Applicant has established the elements of adverse possession of the whole of the suit property that he is claiming, whether the Applicant is entitled to the reliefs sought in his Originating Summons and who should bear the costs of the suit. The Applicant cited several cases on adverse possession some of which I will refer to below.
15. In *Gabriel Mbui v. Mukindia Maranya* (*supra*) the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
- a. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous uninterrupted, and unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.



16. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpencario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

17. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations 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. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

18. In *Gitbu v. Ndeete* [1984] KLR 776 it was held that:

- a. Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
- b. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”

19. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Mubambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu v Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu v. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...”

19 Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim



fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

20. It is on the foregoing principles that the Applicant’s claim falls for consideration. In his Originating Summons, the Applicant is seeking to be declared the owner of the whole of the suit property by adverse possession. The suit property measures 0.46 of a hectare. The burden was on the Applicant to prove that he had occupied the whole of the suit property openly, peacefully, and continuously for an uninterrupted period of 12 years before the filing of the Originating Summons. In his testimony, the Applicant told the court that he entered the suit property in 2000 at the invitation of Ayoo. He stated that he immediately put up a homestead on the suit property. He told the court that his said homestead was partly on Title No. Kisumu/Marera/1194 and partly of Title No. Kisumu/Marera/1193(the suit property). This means that only part of the Applicant's homestead was on the suit property. The Applicant told the court that the portion of the suit property that he was occupying measured approximately 1/8 of an acre (0.125 acres) (0.051 hectares). He stated that it was on this 1/8 of an acre portion of the suit property that his homestead was situated since 2000. He stated that he had fenced his homestead and that the said 1/8 of an acre portion of the suit property was part of his fenced homestead. On cross-examination, the Applicant stated that his claim was limited to the portion of the suit property that he was occupying.
21. In his evidence, the Respondent admitted that the Applicant was occupying a portion of the suit property. He stated that the portion of the suit property occupied by the Applicant measured approximately ¼ of an acre (0.25 acres) (0.10 hectares). He stated that the rest of the suit property was not occupied. According to the ground survey dated 23rd February 2023 by Mbok Geoffrey, the Applicant’s homestead was on Title No. Kisumu/Marera/3045 (a subdivision of Title No. Kisumu / Marera/2779 which originated from Title No. Kisumu/ Marera/1194). According to the said report, the Applicant extended his homestead to cover a portion of the suit property. On the extended portion of the homestead sits the Applicant’s son’s house. According to the report, a portion of the remainder of the suit property was occupied by one, Wycliff who was alleged to have purchased the same from the Applicant. The rest of the suit property was not occupied but was being used by the Applicant in making bricks.
22. There is no evidence as to when the Applicant sold a portion of the suit property to the said Wycliff. There is also no evidence as to when the Applicant started making bricks on a portion of the suit property. It is therefore not clear as to when the time would have started running in favour of the Applicant for the purposes of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya in respect of the two portions of the suit property; one sold by the Applicant to Wycliff and the other used by the



Applicant for brickmaking. From the evidence on record, I am of the view that the Applicant has only proved his adverse possession claim in respect of the portion of the suit property on which his homestead extends. In his evidence, the Applicant stated that this was the portion of the suit property that he occupied in 2000 and was still in his occupation 12 years later in 2022 when he brought this suit. He stated that this was the only portion of the suit property that he was claiming. He did not mention either in his Originating Summons or evidence of any land that he had sold to Wycliff that he was also claiming or any land that he was using for brickmaking. The Applicant's claim was limited to the portion of the suit property on which his homestead was situated. It is my finding therefore that the Applicant has proved that he has acquired the portion of the suit property on which his homestead is situated by adverse possession. His claim to the other portions of the suit property has not been proved.

21. On the issue of costs, costs follow the event unless the court for good reason orders otherwise. The Applicant has not wholly succeeded in his claim. In the circumstances, a fair order on costs would be for each party to bear its costs.

Conclusion

22. In conclusion, the Applicant's Originating Summons dated 4th April 2022 succeeds in part. The court makes the following final orders in the matter;
 1. The Applicant has acquired the portion of Title No. Kisumu/Marera/1193 on which his homestead is situated or extends, by adverse possession.
 2. For the avoidance of doubt, the portion of Title No. Kisumu/Marera/1193 referred to in order 1 above excludes the portion of that land occupied by Wycliff and the other portion used by the Applicant for brickmaking
 3. Kisumu County Land Surveyor shall subdivide and excise the portion of Title No. Kisumu/Marera/1193 on which the Applicant's homestead is situated or extends.
 4. The costs of the subdivision of Title No. Kisumu/Marera/1193 and excision of the portion thereof on which the Applicant's homestead is situated or extends shall be met by the Applicant.
 5. The Respondent shall execute the instrument of transfer and necessary applications for the consent of the Land Control Board to facilitate the transfer to the Applicant of the excised portion of Title No. Kisumu/Marera/1193.
 6. The portion of Title No. Kisumu/Marera/1193 remaining after the said subdivision and excision shall continue to be in the name of Lucas Mbagi Okore deceased to be dealt with by the administrators of his estate in accordance with the orders issued in Maseno Principal Magistrate's Court, Probate and Administration Cause No. E38 of 2020, In the matter of the estate of Lukas Mbagi Okore.
 7. If any party refuses or neglects to sign any document necessary for the execution of the orders issued herein, the Deputy Registrar of this court shall be at liberty to sign the same on behalf of such party.
 8. Each party shall bear its costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE



**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:-**

Mr. Otieno Obiero for the Applicant

The Respondent present in person

N/A for the Interested Parties

Ms. J. Omondi-Court Assistant

