



**Otieno v Aduda & another (Environmental and Land Originating Summons  
28 of 2018) [2024] KEELC 716 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 716 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 28 OF 2018  
SO OKONG'O, J  
FEBRUARY 15, 2024**

**BETWEEN**

**ROMANUS OKENO OTIENO ..... PLAINTIFF**

**AND**

**FRED JUMA ADUDA ..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK OTIENO ODHIAMBO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit by way of Originating Summons dated 14<sup>th</sup> June 2018 seeking the determination of the following questions;
  1. Whether the Plaintiff is entitled to the whole parcel of land known as Title No. Kisumu/Kogony/3660 measuring approximately 0.21 of a hectare (hereinafter referred to only as “the suit property”) by adverse possession thereof for a period exceeding 12 years.
  2. Whether the Defendants’ proprietary interest in the suit property has been extinguished by virtue of the Plaintiff’s adverse possession and whether the 2<sup>nd</sup> Defendant is now holding the title for the suit property in trust for the Plaintiff.
  3. Whether the Plaintiff should be registered as the proprietor of the suit property in place of the 2<sup>nd</sup> Defendant.
  4. Whether the Defendants should be ordered to pay the costs of the suit to the Plaintiff.
2. The Originating Summons was supported by the affidavit of the Plaintiff sworn on 14<sup>th</sup> June 2018. The Plaintiff averred that at all material times, the 1<sup>st</sup> Defendant had been and remained the registered proprietor of the suit property. The Plaintiff averred that the 1<sup>st</sup> Defendant became the registered proprietor of the suit property on 15<sup>th</sup> August 1996. The Plaintiff averred that there was in existence



another extract of the register of the suit property in which it was indicated that it was the 2<sup>nd</sup> Defendant who was registered as the owner of the suit property on 15th August 1996. The Plaintiff averred that the purported registration of the 2<sup>nd</sup> Defendant as the owner of the suit property on 15th August 1996 was fraudulent.

3. The Plaintiff averred that he had been occupying the whole of the suit property since 1997. The Plaintiff averred that he had occupied the suit property for over 20 years as at the time of filing the Originating Summons. The Plaintiff averred that the suit property was adjacent to Title Nos. Kisumu/Kogony/904 and Kisumu/Kogony/906 owned by his parents which were subsequently amalgamated. The Plaintiff averred that on 19<sup>th</sup> October 1996, his father, Christopher Otieno Osir, established his homestead on Title No. Kisumu/Kogony/906. The Plaintiff stated that his father thereafter fenced the said homestead on which he settled his family.
4. The Plaintiff averred that in 1997, he put up a house in the said homestead of his father. The Plaintiff averred that later in the same year, he agreed with his father that he would also establish his own homestead on the said portion of land within his father's homestead on which he had constructed his house. The Plaintiff averred that he did as agreed with his father and put up his own homestead in his father's compound in October 1997 which he also fenced. The Plaintiff averred that he continued to occupy his home without any interruption or hindrance. The Plaintiff averred that towards the end of November 1997, the 1<sup>st</sup> Defendant came to him and claimed that he had established his homestead on part of the 1<sup>st</sup> Defendant's parcel of land, Title No. Kisumu/Kogony/3660("the suit property"). The Plaintiff averred that his father assured him that his homestead was on the family land. The Plaintiff averred that he became curious about the site of his homestead and in December 1997, he went to the land office and bought a survey map to confirm whether or not he was indeed occupying any portion of the suit property which was owned by the 1<sup>st</sup> Defendant. The Plaintiff averred that the enquiries he made at the land office revealed that his homestead was on the 1<sup>st</sup> Defendant's parcel of land, Title No. Kisumu/Kogony/3660 (the suit property).
5. The Plaintiff averred that the 1<sup>st</sup> Defendant demanded that he vacates the suit property before the end of 1997. The Plaintiff averred that he refused to vacate the property since it was his father who had pointed out to him the location where he had set up his homestead. The Plaintiff stated that he continued to occupy the suit property peacefully as of right without any interference from the Defendants for over 20 years as at the time he came to court.
6. The Plaintiff averred that he had fenced the suit property and had two permanent houses thereon which he occupied with his family (wife and children). The Plaintiff stated that he had also planted various types of trees on the suit property all of which were mature. The Plaintiff averred that for all the years he had occupied the suit property, the Defendants had never entered or used the property. The Plaintiff averred that he had completely excluded the Defendants from the property.
7. The 1<sup>st</sup> Defendant filed a replying affidavit on 25<sup>th</sup> November 2019. The 1<sup>st</sup> Defendant averred that sometime in 2018, he sold the suit property to the 2<sup>nd</sup> Defendant and transferred the property to the 2<sup>nd</sup> Defendant on 18<sup>th</sup> April 2018. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant was the absolute registered proprietor of the suit property. The 2<sup>nd</sup> Defendant averred that there was nothing fraudulent in the transferred of the suit property to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant admitted that the suit property was adjacent to Title Nos. Kisumu/Kogony/904 and Kisumu/Kogony/ 906 owned by the Plaintiff's parents. The 1<sup>st</sup> Defendant averred that the Plaintiff was the son of Leokadia Wasonga Otieno and Maurice Otieno Osir who owned and were residing on Title Nos. Kisumu/Kogony/904 and Kisumu/Kogony/ 906 with the Plaintiff as a family.



8. The 1<sup>st</sup> Defendant averred that after acquiring the suit property, he noticed that the Plaintiff's said parents had encroached on the property from their adjacent parcels of land, Title Nos. Kisumu/Kogony/904 and Kisumu/Kogony/ 906. The 1<sup>st</sup> Respondent averred that he engaged the Plaintiff's parents on the issue of the trespass through correspondence and after along deliberation, the Plaintiff's mother, Leokadia Wasonga Otieno agreed to purchase the property at Kshs. 3,000,000/-. The 1<sup>st</sup> Defendant averred that they entered into a written agreement for sale with the Plaintiff's mother on 24<sup>th</sup> January 2013. The 1<sup>st</sup> Defendant averred that the Plaintiff's mother paid a deposit of Kshs. 200,000/-. The 1<sup>st</sup> Defendant averred that at the time of the agreement of sale between the 1<sup>st</sup> Defendant and the Plaintiff's mother on 24<sup>th</sup> January 2013, the Plaintiff had not put up a house on the suit property. The 1<sup>st</sup> Defendant averred that the Plaintiff's mother, Leokadia Wasonga Otieno failed to honour her part of the agreement dated 24<sup>th</sup> January 2013 with the 1<sup>st</sup> Defendant as a result of which on 27<sup>th</sup> April 2015, the 1<sup>st</sup> Defendant served her with 14 days' notice to complete the agreement which she did not respond to. The 1<sup>st</sup> Defendant averred that after the Plaintiff's mother failed to complete the agreement by paying the balance of the purchase price, the 1<sup>st</sup> Defendant sold the suit property to the 2<sup>nd</sup> Defendant on 28<sup>th</sup> March 2018 and transferred the same to him. The 1<sup>st</sup> Defendant averred that when he sold the suit property to the 2<sup>nd</sup> Defendant in 2018, the Plaintiff had not put up any structure on the suit property.
9. The 1<sup>st</sup> Defendant averred that he took the 2<sup>nd</sup> Defendant to the suit property as part of due diligence by the 2<sup>nd</sup> Defendant and they both confirmed that the property was vacant. The 1<sup>st</sup> Defendant averred that this suit was brought after he informed the Plaintiff's parents, Leokadia Wasonga Otieno and Maurice Otieno Osir that he had sold the land to the 2<sup>nd</sup> Defendant and that he would refund the sum of Kshs.200,000/- paid to him as a deposit by Leokadia Wasonga Otieno.
10. The 2<sup>nd</sup> Defendant responded to the Originating Summons through a replying affidavit sworn on 25<sup>th</sup> November 2019. The 2<sup>nd</sup> Defendant adopted the contents of the replying affidavit by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant averred that he purchased the suit property from the 1<sup>st</sup> Defendant on 28<sup>th</sup> March 2018. He stated that before entering into the said agreement, he conducted due diligence which included visiting the suit property. The 2<sup>nd</sup> Defendant averred that the suit property was free from any form of encumbrance. The 2<sup>nd</sup> Respondent averred that when he visited the suit property, the same was vacant. He stated that there were no developments on the land.
11. At the trial, the Plaintiff who testified as PW1 reiterated that he had occupied the suit property since 1997 and that he had his homestead thereon. The Plaintiff adopted his affidavit in support of the Originating Summons as his evidence in chief and produced the documents that were annexed thereto as exhibits. On cross-examination, the Plaintiff stated that he was born on 17<sup>th</sup> November 1986 and started living on the suit property when he was 11 years old. He stated that he put up a house on the property in 1997. He admitted that his parents were Leokada Otieno Wasonga and Maurice Otieno Osir. He admitted that while he was 11 years old, he was still under their care. He stated that his mother was registered as the owner of Title No. Kisumu/Kogony/904 while his father was registered as the owner of Title No. Kisumu/Kogony/906 which parcels of land had been amalgamated.
12. On re-examination, the Plaintiff stated that the first house that was put up on the suit property was a semi-permanent house and that that was not the house that he was occupying. He stated that the house was put up by his father. He stated that he did not move out of his father's homestead. He stated that he later discovered that the land he was occupying was the suit property.
13. On examination by the by the court, the Plaintiff stated that he discovered in 1997 that the land he was occupying was the suit property when after putting up a house on the land, one, Consolata Okore



started complaining. He stated that his house was occupying 1/8 of the suit property. He stated that in 1997, he was in class 5 at St. Alloys Ojola Primary School. On further cross-examination by his advocate, he stated that he was occupying the whole of the suit property. He stated that he had put up several houses on the land.

14. The 2<sup>nd</sup> Defendant was the first to give evidence for the defence. He testified as DW1. He adopted his replying affidavit to the Originating Summons filed on 25<sup>th</sup> November 2019 as his evidence in chief. He stated that he was the registered owner of the suit property which he purchased from the 1<sup>st</sup> Defendant. He produced a copy of the sale agreement between him and the 1<sup>st</sup> Defendant dated 28<sup>th</sup> March 2018 as D.Exh.1 and a copy of the 1<sup>st</sup> Defendant's title deed for the suit property as D.Exh.2. He stated that when he purchased the suit property, the same was vacant. He stated that there was only a live fence. He stated that apart from the live fence which was on one side of the property, there was nothing within the boundaries of the suit property. The 2<sup>nd</sup> Defendant stated that he visited the suit property on several occasions soon after the same was transferred to his name and found the same still vacant. The 2<sup>nd</sup> Defendant stated that after the Plaintiff's family learnt that the suit property had been transferred to him, they decided to put up developments thereon. He stated that developments on the property were put up after the property had been sold to him in 2018.
15. On cross-examination, the 2<sup>nd</sup> Defendant stated that after the suit property was transferred to him, he went back there the same month but since then, he had not gone back even after he was served with summons. He stated that the live fence on the suit property had been put in place by the 1<sup>st</sup> Defendant. Upon examination by the court, the 2<sup>nd</sup> Defendant stated that the purchase price for the suit property was Kshs. 1,500,000/- of which he paid Kshs. 900,000/- leaving a balance of Kshs. 600,000/- due to the 1<sup>st</sup> Defendant. He denied that the Plaintiff was in occupation of the suit property when he purchased the same.
16. In further cross-examination, he confirmed that the purchase price was Kshs. 1,500,000/- of which there was a balance of Kshs. 600,000/- that he was to pay. He stated that he had not paid the said balance because of this suit that came up after the transaction.
17. The 1<sup>st</sup> Defendant gave evidence next as DW2. The 1<sup>st</sup> Defendant adopted his replying affidavit to the Originating Summons filed on 25<sup>th</sup> November 2019 as his evidence in chief and produced the annexures thereto as D.Exh. 3 and D.Exh.4. The 1<sup>st</sup> Defendant stated that he bought the suit property from Consolata Auma Okore. He stated that he bought the land as an investor and wanted to use it for an industrial project. He stated that when he sold the suit property to the 2<sup>nd</sup> Defendant, he had not developed the same. He stated that his neighbor, Leokadia Wasonga Otieno approached him through her father Romanus Otieno with an offer to purchase the suit property. He stated that he agreed to sell the land to Leokadia Wasonga Otieno and they entered into a sale agreement with her on 24<sup>th</sup> January 2013. He stated that the purchase price was Kshs. 3,000,000/- of which she paid Kshs. 200,000/- upon the execution of the agreement leaving a balance of Kshs. 2,800,000/-. He stated that Leokadia Wasonga Otieno did not pay the said balance of the purchase price. He stated that Clause 7 of the agreement provided that Leokadia Wasonga Otieno was not to take possession of the suit property before completion. He stated that she never took possession. The 1<sup>st</sup> Defendant stated that he was patient with Leokadia Wasonga Otieno until 27<sup>th</sup> April 2015 when he wrote to her a demand letter through an advocate asking for the balance of the purchase price. He stated that the demand was ignored. He produced the demand letter as D.Exh.5. The 1<sup>st</sup> Defendant stated that he had a boundary dispute with Leokadia Wasonga Otieno before he sold the suit property to her because they were his immediate neighbours and they had the habit of encroaching on his land. He stated that Leokadia Wasonga Otieno and her husband had put up a fence around the suit property. He stated



that the boundary dispute was not resolved because Leokadia Wasonga Otieno and her husband did not cooperate.

18. The 1<sup>st</sup> Defendant stated that he needed money for studies and he therefore decided to sell the suit property to the 2<sup>nd</sup> Defendant. He stated that he entered into a sale agreement with the 2<sup>nd</sup> Defendant on 28<sup>th</sup> March 2018. He stated that he showed the 2<sup>nd</sup> Defendant the boundaries of the suit property on the map. He stated that he also showed the Defendant the live fence. He stated that what was on the suit property at the time were temporary structures made with iron sheets. He stated that he did not know who had put up the said structures on the property. He stated that when he sold the suit property to Leokadia Wasonga Otieno, the structures were not on the suit property. He stated that the Plaintiff who was the son of Leokadia Wasonga Otieno must have been taken to the suit property by Leokadia Wasonga Otieno and her husband. He stated that the Plaintiff was not known to him and they had never met. He stated that the Plaintiff's claim was not genuine because he was a trespasser on the suit property. He stated that he had not released the title deed for the suit property to the 2<sup>nd</sup> Defendant.
19. On cross-examination, the 1<sup>st</sup> Defendant stated that the trespass by the Plaintiff and his family had been going on for several years. He stated that he had never visited the property since 2018 when he sold it to the 2<sup>nd</sup> Defendant. He reiterated that when he took the 2<sup>nd</sup> Defendant to the suit property, there were temporary structures on the property and a main house. He stated that the Plaintiff's family had fenced several parcels of land using a live fence to form one compound and one of the parcels was the suit property. He stated that the suit property had no physical boundaries. He stated that some of the illegal structures could have been on the suit property while others could have been in the neighbouring plots. He stated that the main house that he referred to belonged to the parents of the Plaintiff and the same was not on the suit property.
20. In re-examination, the 2<sup>nd</sup> Defendant stated that the Plaintiff was not known to him and that his complaints were directed at Leokadia Wasonga Otieno and her husband. He stated that he never complained to the Plaintiff about trespass. He stated that what was on the suit property were temporary structures and not homesteads. He stated that the said temporary structures were not occupied. He stated that the temporary structures were not on the suit property when he sold the property to Leokadia Wasonga Otieno in 2013.

### **The submissions by the parties**

21. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff had not filed submissions at the time of writing this judgment while the Defendants filed submissions dated 4<sup>th</sup> October 2023 on 11<sup>th</sup> October 2023. In their submissions, the Defendants submitted that the Plaintiff had failed to prove his adverse possession claim.

### **Analysis and determination**

22. The following in my view are the issues arising for determination in this suit;
  1. Whether the Plaintiff has proved his adverse possession claim.
  2. Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons.
  3. Who is liable for the costs of the suit?

### **Whether the Plaintiff Has Proved His Adverse Possession Claim in Respect of the Suit Property.**

23. I have considered the Originating Summons together with the evidence that was tendered by the Plaintiff in support thereof. I have also considered the evidence that was tendered by the Defendants



in opposition to the application. 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 vs. 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 vs. Njuguna [1983] KLR 173. Did the respondents discharge this burden?”

24. In Gabriel Mbui v. Mukindia Maranya [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. 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.
9. 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.
10. 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.

25. 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, *nec vi, nec clam, nec precario* (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.”

26. It is on the foregoing principles that the Plaintiff's claim falls for consideration. The burden was on the Plaintiff to establish the elements of adverse possession set out in the above cases. The Plaintiff told the court that he was born in 1986 and that he entered the suit property in 1997. The Plaintiff having been born in 1986 would have been a minor until 2004. The Plaintiff could not, therefore, acquire any land by adverse possession until 2004. When the Plaintiff alleged to have entered the suit property in 1997, the Plaintiff was only 11 years old. He told the court that in 1997, he was in class 5 in Primary School. A class 5 pupil could not have put up a homestead as claimed by the Plaintiff. The Plaintiff claimed that he put up a traditional customary hut in his father's homestead in 1997 and in the same year, he built his homestead. The Plaintiff was a school-going minor of 11 years without a wife or income. I wonder how the Plaintiff could have put up a homestead. I find the evidence given before this court by the Plaintiff difficult to believe. The Plaintiff also told the court that he learnt that he was occupying the suit property in 1997 when one of the neighbours complained to him that he had put up a house on land that did not belong to him and when he went to the land office and made inquiries, he discovered that his house was on the suit property. I find all these stories made up for the case. As I have mentioned, the Plaintiff was 11 years old and in school. The Plaintiff had both parents. I wonder how the alleged neighbour could have complained to a child while his parents were there. Again, I cannot see how the Plaintiff could have gone to the land registry and obtained survey plans. I find no truth in the evidence tendered by the Plaintiff as to when he entered the suit property. In the absence of evidence regarding the date of his entry onto the suit property, it is difficult to determine when the time started running in his favour.
27. The Plaintiff did not also convince me that he was occupying the whole of the suit property as he claimed. The Plaintiff talked of two permanent houses, rental houses and some form of a garden where he planted different kinds of trees on the suit property. No evidence was placed before the court in proof of all these. The Defendants denied that the Plaintiff was in occupation of the suit property on 28<sup>th</sup> March 2018 when the 1<sup>st</sup> Defendant sold the suit property to the 2<sup>nd</sup> Defendant. The Plaintiff had a duty not only to prove when he entered the suit property but also that he was in actual possession of the property. The Plaintiff did not also prove that the 1<sup>st</sup> Defendant was aware of his occupation of the suit property. The evidence on record shows that the persons that the 1<sup>st</sup> Defendant had accused of trespass were the Plaintiff's parents. These were the people the 1<sup>st</sup> Defendant knew were encroaching on his land from time to time and had even offered to purchase the suit property for which they paid a deposit of Kshs. 200,000/-. The 1<sup>st</sup> Defendant told the court that the Plaintiff was unknown to him and that they had never met. I find no evidence that the Plaintiff's alleged occupation of the suit property was open and that the 1<sup>st</sup> Defendant knew or could have known of the same. The evidence on record shows that the 1<sup>st</sup> Defendant's attempt to have the boundaries of the suit property and the Plaintiff's parents' parcels of land determined did not succeed due to failure on the part of the Plaintiff's parents to cooperate. The Plaintiff told the court that it was after he consulted survey reports that he learnt that he was in occupation of the suit property. I wonder how the 1<sup>st</sup> Defendant could have known that



the Plaintiff's homestead which in his own words was inside his parent's compound was built of the suit property.

28. For the foregoing reasons, it is my finding that the Plaintiff has failed to prove his adverse possession claim against the Defendants and as such he is not entitled to the reliefs sought in the Originating Summons. On the issue of costs, under section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The Plaintiff has failed in his claim against the Defendants. The Plaintiff will have to bear the costs of the suit.

### **Conclusion**

29. In conclusion, the suit is dismissed with costs to the Defendants.

**DATED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered in the presence of:

Mr. M. Orengo for the Plaintiff

N/A for the Defendants

Ms. J. Omondi - Court Assistant

