



REPUBLIC OF KENYA



**Ajigo v Opany (Environment & Land Case E027 of 2022)  
[2024] KEELC 1711 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E027 OF 2022**

**AY KOROSS, J  
MARCH 21, 2024**

**BETWEEN**

**WILLIAM AMONDI AJIGO ..... PLAINTIFF**

**AND**

**DANIEL OKOTH OPANY ..... DEFENDANT**

**JUDGMENT**

**Background of the case**

1. This suit was instituted by an originating summons (OS) dated 2/12/2022 which was supported by the affidavit of the plaintiff which he deposed on even date. In opposition, the defendant filed a replying affidavit which he deposed on 18/01/2023.

**Plaintiff's case and evidence**

2. It was the plaintiff's case that he had allegedly acquired North Gem/Lundha/239 (suit property) which was registered in the name of David Opany Wamboga (David) by means of adverse possession.
3. The plaintiff contended he had sued the defendant in his capacity as administrator and beneficiary David's estate and consequently, sought the following reliefs from this court: -
  - a. A declaration the plaintiff had acquired prescriptive rights over the suit property.
  - b. The respondent do execute transfer and consent documents in the plaintiff's favour and in default, the deputy registrar do execute the documents.
  - c. Permanent injunction be issued against the defendant restraining him, his relatives, workers or agents from interfering with the suit property.
  - d. Costs of the suit be borne by the defendant.



4. The plaintiff testified as PW1 and his evidence was composed of his oral testimony, affidavit, witness statement and documents he produced in support of his case. His evidence was also led by his witnesses Daudi Obat Oluo and Raphael Abwao Ofudu who respectively testified as PW2 and PW3.
5. It was PW1's testimony the suit property originally belonged to his Uncle Omwana Were (Omwana) who at adjudication, registered it in his step son's name one Okach Omwana also known as William Okach Amisi.
6. According to the plaintiff, Okach Omwana relocated to his biological father's residence thus leaving Omwana in usage and occupancy of the suit property and that upon Omwana's demise in 1975, he (plaintiff) entered the suit property which was a period of 46 years to the time of filing suit. He stated his occupancy had been peaceful and uninterrupted.
7. Upon cross examination and in reiterating some of his testimony in his exam in chief, he testified it was only in the recent past that he discovered the suit property had been sold by Okach Omwana to David. He further asserted he entered the suit property in 1971 and that in 2022, he never chased Peter Orwa from the suit property.
8. PW2 and PW3 who had identical statements testified they knew the plaintiff's family had always occupied the suit property with the plaintiff having been in occupation for 46 years.
9. When PW2 was cross examined, he testified he was the plaintiff's neighbour and to his knowledge, the plaintiff did not have a residence on the suit property but rather cultivated it which he had so done exclusively.
10. During his cross examination, PW3 testified he was the plaintiff's neighbour and knew the plaintiff had cropped maize, cassava and beans on the suit property for 46 years and many at times, he recruited temporary workers to conduct farming activities on his behalf on the suit property.
11. It was his testimony that post -harvest, the plaintiff was in the habit of allowing people including PW3 to graze their animals on the suit property. According to him, the only person who had strangely sought to slash crops on the suit property was Orwa which was about 7 years ago but he was repulsed. In his testimony, he concluded he had never seen eucalyptus trees growing on the suit property.

#### **Defendant's case and evidence**

12. In his replying affidavit, it was the defendant's case the suit against him was incompetent, frivolous and misconceived and to him, Okach Omwana was distinct from William Okach Amisi with the former being the son of the latter.
13. It was his case upon William Okach Amisi inheriting the suit property from Okach Omwana, he relocated from the suit property and upon such relocation, he sold it to David in 1991.
14. He stated his family cultivated the suit property and at one point, they leased it out to Peter Orwa who cultivated it upto the year 2021 and that Orwa only stopped such cultivation after the area chief restrained him. It was his position this barring gave the plaintiff an opportunity to enter the suit property.
15. In testifying as DW1, the defendant's testimony which was largely a regurgitation of averments contained in his affidavit stated he was David's legal administrator and personal representative and that David purchased the suit property from Okach Omwana in 1980.



16. According to the defendant, his family had since then cultivated the suit property by planting sugarcane, maize, beans and eucalyptus trees and that Orwa took care of it especially after his eucalyptus trees were destroyed by termites.
17. On cross examination, it was his case his parents planted sugarcane on the suit property which was only once and this occurred in the 1980s. He testified it was Orwa and not the area chief who stopped him from using the suit property and that he had never leased out the suit property and Orwa was merely a caretaker.
18. Orwa testified as DW2 and it was evidence he initially worked on the suit property as an employee of the defendant's family under the supervision of one Joseph Awiti Ogwang' (Joseph). He stated Joseph's relationship with the suit property was diverse since at times he would act as either its caretaker, owner or head lessee.
19. It was his testimony all this changed in 2006 when the defendant's mother died and it was at this juncture that he was employed by the defendant as a caretaker of the suit property.
20. According to him, he even planted eucalyptus seedlings on the suit property in 2015 which unfortunately were destroyed by termites. However, his caretaking duties were terminated on 9/08/2021 by the plaintiff and that the area assistant chief restrained him from entering the suit property.
21. Orwa's line of evidence in chief was corroborated by Sharon Adhiambo Orwa, Moses Osare Ogwang', Joseph Awiti Ogwang' and Luka Were's evidence in chief. These witnesses respectively testified as DW2 to DW6. Nonetheless, on cross examination, their evidence were at variance as shall be demonstrated hereafter.
22. DW2 testified he started using the suit property from 2014 to 2021, whilst DW3 testified she was Orwa's wife and not DW4's as alluded in her statement and DW4 denounced the signature in his statement and asserted he only worked in the suit property upto 1994 which he so did under the defendant's mother's instructions.
23. In addition, DW5 testified he utilised the suit property from 1987 to 2014 and since his departure in 2014, he did not know the activities that were carried out therein while DW6 was unsure if he ever recorded a witness statement. After closing the plaintiff and defence cases, parties' counsels filed written submissions.

### **Plaintiff's submissions**

24. The plaintiff's counsel on record M/s Ooro Awana & Co. Advocates filed their written submissions on 8/11/2023. Preliminarily, counsel submits the witness statements of defence witnesses who had distanced themselves from their statements should be disregarded by the court.
25. In their submissions, counsel identifies a singular issue as arising for determination; whether the plaintiff proved his claim of adverse possession.
26. In outlining the principles of adverse possession, as set out in the persuasive decision of the Supreme Court of India in Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779), counsel submits the plaintiff has met the threshold for several reasons inter alia; the plaintiff proved he has occupied the suit property from 1975 to date, occupied a defined portion as was determined in the decision of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR and his occupancy was without interruption.



27. Counsel further submits the defendant's evidence and that of his witnesses were unsubstantiated, contradictory and incredible and urges the court to award the plaintiff the suit property.

### **Defendant's submissions**

28. The defendant's counsel on record M/s Otieno & Achieng' Company Advocates filed their written submissions on 24/11/2023. In their submissions, counsel submits the principles of adverse possession were well settled in the case of Wambugu v Njuguna [1983] KLR 173 and according to counsel, the burden of proof lay with the plaintiff which he had so failed to discharge and urges this court to dismiss the plaintiff's claim with costs.

### **Issues for determination, Analysis and Determination**

29. I have considered the pleadings, evidence adduced by the parties, as well the counsels' rival submissions. Before this court proceeds further, it notes none of the counsels bothered to avail copies of authorities they rely upon to augment their arguments and on that basis, I will not consider them.
30. Being guided by the provisions of law and judicial precedents, 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 defendant.
  - II. If (I) is in the affirmative, whether the plaintiff proved his claim of adverse possession.

#### **I. Whether the plaintiff's suit is competent against the defendant**

31. Section 2 of the *Civil Procedure Act* has defined a 'legal representative' as: -

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

32. Order 3 Rule 7 of the Civil Procedure Rules provides as follows: -

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.’

33. The Court of Appeal decision of Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR stated: -

“...the proper defendant to the plaintiff's claim should have been the estate of Ndolo through the executrix of the will and not the beneficiaries.”

34. It is undisputed the defendant is the administrator of David's estate and it is settled law a claim of adverse possession is maintainable against the registered proprietor of a suit property in this case David and or his estate.
35. The plaintiff appreciated this position and paragraphs 12 and 13 of the plaintiff's affidavit demonstrates the lengths the plaintiff undertook to ensure the defendant attained such capacity



including citing him in succession proceedings which culminated to the defendant so complying by obtaining letters of administration.

36. The plaintiff even alludes the plaintiff is sued in a representative capacity by asserting "...therefore sued the said respondent as the administrator of the estate of David..." yet, despite this, he has sued the defendant in his personal capacity instead of suing him as administrator of David's estate. Put another way, the defendant lacks locus standi to be sued in his personal capacity.
37. The issue of locus standi is a cardinal principle in law. If one lacked locus standi in a civil suit, then a suit could not be instituted or maintained against him. It is my finding the suit could not be maintained against the defendant in his personal capacity. In the absence of locus standi, this court cannot exercise jurisdiction since the suit against the defendant is a nullity. I need not say more.
38. The defendant is not the registered owner of the suit property and ultimately, I find and hold the suit against him is incompetent and a nullity. It is for this reason that the plaintiff's suit is consequently struck out with costs to the defendant.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF MARCH 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Ooro F. for the plaintiff

Miss Otieno for the defendant

Court assistant: Ishmael Orwa

