



REPUBLIC OF KENYA



KENYA LAW
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**Adala v Omay & 4 others (Environment & Land Case E004 of 2021)
[2024] KEELC 1523 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E004 OF 2021**

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

BETWEEN

JOHN ODHIAMBO ADALA PLAINTIFF

AND

MICHAEL OMAVA 1ST DEFENDANT

WILLIAM ONYANGO 2ND DEFENDANT

JACKSON OKETCH OGWAYO 3RD DEFENDANT

LAND REGISTRAR-SIAYA 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

Background

1. The plaintiff filed his originating summons ('OS') dated 10/11/2021 against the defendants with the 1st to 3rd defendants being his distant relatives and the 4th and 5th defendants being government offices. The 5th defendant ordinarily represents the 4th defendant in court proceedings.
2. The plaintiff's claim of adverse possession was in respect of land parcels nos. Siaya/Umala/138 and 139 ('suit properties') which are respectively registered in the 1st and 2nd defendants' names and he sought for the following reliefs from this court: -
 - a. He was entitled to the suit properties prior to their illegal transfer to the 1st and 2nd defendants.
 - b. A declaration the 1st and 2nd defendants were holding the suit properties in trust for him.
 - c. A declaration that by adverse possession, he had become the legal owner of the suit properties.



- d. The 4th and 5th defendants be compelled to transfer the suit properties to him and in default, an order be issued against the 4th defendant to transfer the suit properties to him and register his name in place of the 1st and 2nd defendants.
 - e. Entries made in the register of the suit properties on diverse dates of 15/05/1978 and 5/03/2014 be rectified and cancelled.
 - f. Costs be in the cause.
3. The originating summons was premised on the supporting affidavit of the plaintiff John Odhiambo Adala which he deposed on 10/11/2021.
 4. In reply to the OS, the 1st defendant Michael Omayya who had authority of the 2nd and 3rd defendants filed a replying affidavit deposed on 6/03/2022.
 5. Under the province of Order 37 Rule 19 of the Civil Procedure Rules, the court deemed the OS a plaint and replying affidavit a defence. Thereafter, the suit proceeded for hearing by viva voce evidence. It is noted the 4th to 5th defendants did not take part in these proceedings.

Plaintiff's evidence.

6. The plaintiff testified as PW1 and adopted his supporting affidavit as his evidence in chief. It was his evidence that another suit had been determined by another court which had declined to exercise jurisdiction over his claim of adverse possession.
7. It was his testimony he had occupied the suit properties openly and continuously for a period of over 12 years in a manner that was without secrecy and without interruption. According to the plaintiff, his occupancy was within the knowledge of the defendants.
8. On cross examination, it was his testimony that though he had not tendered to court documents to show the 1st and 2nd defendants were the owners of the suit properties, he owned them. Further, it was his testimony that though he had occupied 5 acres of Siaya/U mala/138 and his homestead stood on less than a ¼ of acre of it, during the pendency of the suit, the 1st defendant entered it and erected a home upon it.
9. As to Siaya/U mala/139, it was his position it was ancestral land which he derived from his grandfather and his parents used it and in particular, his mother tilled it to the date of her demise. In addition, it was his evidence that notwithstanding he had established a church and pit latrine on it and ploughed it, the 2nd defendant and a village elder had invaded this particular suit property and started cultivating it and since 2011, all efforts for him to till it had been thwarted thus his occupancy over it had never been peaceful.
10. On reexamination, he stated the suit properties were comprised of 5 acres each and his house stood on 1/8th of Siaya/U mala/138.
11. His evidence was led by Ezekiel Ohanga Omondi who testified as PW2 who adopted his witness statement dated 9/10/2023. He testified that as a friend of the plaintiff, the plaintiff had at one time allowed him to plant cassava on the suit properties and the plaintiff's family had always been in occupation of them and in fact, the plaintiff's father was buried on the suit properties in 1973.
12. On cross examination, he stated that he was a relative to the 1st to 3rd defendants and his home was within the neighbourhood of the suit properties.



1st to 3rd defendants' evidence

13. The 1st defendant testified as DW1 and relied on his replying affidavit as his evidence in chief and also produced documents in support of his case as DEx.1 to DEx.5 which were respectively an authority to act, judgment of Ukwala ELC Case No.30 of 2018 (lower court case) which was between the plaintiff herein as a plaintiff and 1st to 3rd defendants herein as defendants, a notice of withdrawal of appeal in Siaya ELC Appeal No.32 of 2021 which was an appeal against the lower court decision and the suit properties' greencards.
14. He stated the plaintiff was a stranger and in the same breath testified the plaintiff was a relative traceable to their common great grandfather. It was his evidence and the plaintiff's lineage had relocated from the suit properties to a place called Kibos. However, his (1st defendant's) father implored upon him to temporarily accommodate the plaintiff in the suit properties; which he did. He further stated the parties had subsisting conflicts and court cases.
15. On cross examination, he testified he and the 2nd defendant acquired the suit properties from their father and his advocate would know whether he occupied the suit properties or not.

Plaintiff's submissions

16. The plaintiff's counsel M/s. Agina & Associates filed his written submissions dated 24/11/2023 and identifies 2 issues for determination which are whether the plaintiff has met the threshold of adverse possession and an award of costs.
17. While seeking costs and relying on Sections 7, 13 and 38 of the *Limitation of Actions Act*, counsel submits adverse possession attaches to land and relies on the case of Maweu v Kiu Ranching & Farming Cooperative Society Ltd [1985] eKLR. According to counsel, the plaintiff has met the elements of adverse possession and the plaintiff's occupancy is undisputed. Further, counsel submits that as evidenced from the record, the defendants' affidavits are contradictory.
18. Counsel submits that time could have stopped running if the defendants had instituted suit against the plaintiff; which they had not and to this end, relies on the Court of Appeal decision of Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR where the court stated: -

“In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. See Njuguna Ndatho V Masai Itumu & 2 Others Civil Appeal No 231 of 1999.”

1st -3rd defendants' submissions.

19. The firm of M/s Maxwell O. Ogonda & Associates who represented them filed written submissions dated 17/11/2023. Counsel identifies several issues for determination which were mostly on whether the components of adverse possession are satisfied by the plaintiff and whether the orders sought should be granted.
20. Counsel submits the plaintiff has not met the elements of adverse possession since his pleadings were bereft of material facts and that from the evidence, the plaintiff is not in exclusive possession and even if the plaintiff occupied a portion thereof, it is with permission.



21. Counsel submits the plaintiff is not in peaceful occupation since there have been several proceedings between the parties and in particular, Ukwala Criminal Case No. 415 of 2021 and further submits the plaintiff has not proved his case to the required standards.
22. To buttress his arguments, counsel relies on Sections 7, 13, 16, 17 and 38 of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#) and Section 7 of the [Land Act](#) and the Court of Appeal decision of Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR.

Issues for determination

23. The court has carefully read and considered the pleadings by the parties herein, evidence adduced, submissions, provisions of law and authorities cited and establishes the issues for determination are;
 - a. Whether the suit is competent against the 3rd defendant.
 - b. Whether the plaintiff has met the threshold for grant of orders of adverse possession?
 - c. What orders should this court issue including an order as to costs of the suit?

Analysis and determination

24. Having identified the issues that arise for determination, these issues shall be addressed consecutively: -

a. Whether the suit is competent against the 3rd defendant.

25. 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: -

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

25. The 3rd defendant is not the registered owner of the suit properties and I find and hold the suit against him is incompetent and a nullity. Consequently, I hereby strike out the suit against him.

b. Whether the plaintiff has met the threshold for grant of orders of adverse possession?

27. In a claim of adverse possession, a possessor of land owned by a registered proprietor may by some colour of right acquire valid title to it on condition that all the components of this doctrine are met and the adverse possessor has been in occupation for a period of 12 years.

28. In the Kenyan context, the doctrine is statutorily underpinned in our [Limitation of Actions Act](#) and the relevant provisions are found in Sections 7, 13 and 38 thereof. These provisions state as follows: -

Section 7 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.”

Section 13 states that: -

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run



(which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Lastly Section 38 (1) elucidates that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

29. Adverse possession is a fact that is usually observed upon the land and the onus is on the person claiming adverse possession to prove on a balance of probability the key components of adverse possession.
30. The Supreme Court of India decision of *Karnataka Board of Wakf vs Government of India & Others* (2004) 10 SCC 779 was cited with approval in the Court of Appeal decision of *Ruth Wangari Kanyagia* (Supra) which summarized the principles as follows: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

31. The Court of Appeal in the decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21 where Lindley MR expressed himself as follows: -

“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 of the requisite number of years.”



32. Now, turning to the facts of this case, the element of time for purposes of proving adverse possession is crucial and in particular the alleged date of entry.
33. However, I must mention that even though the date of commencement of time was not disclosed, the plaintiff's suit in Ukwala ELC Case No.30 of 2018 did not interfere with time since the learned trial magistrate declined to exercise jurisdiction over the claim of adverse possession. Further, the suit was not filed by the 1st and 2nd defendants who are indisputably the registered owners of the suit properties. See Peter Kamau Njau (Supra).
34. In his pleadings, the plaintiff testified that he had occupied the suit properties for over 12 years without disclosing his date of entry. Although he testified that he was born in Siaya/U mala/138, he did disclose when he was born but from the record in particular his ID card no. 31xxxx, it was evident he was an elderly man and his evidence that he was born on this particular suit property was unshaken and I am satisfied he proved he had lived in Siaya/U mala/138 for over 12 years to the time of filing suit.
35. As to the element occupancy of a defined portion in a manner that is peaceful, open and continuous, the plaintiff testified that he occupied the suit properties whilst 1st defendant's testimony was full of contradictions. At one point he averred the plaintiff was in occupation with permission, in another he testified the plaintiff's occupancy was peaceful and in the same breath stated such occupancy was unpeaceful. He further testified the plaintiff was not in occupation. Thus, I find the 1st defendant's testimony was untruthful and unreliable whilst the plaintiff's testimony was consistent.
36. I am satisfied with the plaintiff's testimony that at one-point in time, he peacefully and solely occupied the suit properties but this was interfered with by the 1st and 2nd defendant's re-entry.
37. I am also satisfied that as for Siaya/U mala/138, the 1st defendant entered this suit property in April 2023 which is when this suit was alive in court. I am also satisfied that the 2nd defendant ingressed Siaya/U mala/139 in 2011 and the plaintiff's efforts to enter this suit property was thwarted by the 2nd defendant.
38. It is noted the 1st defendant's reentry onto a portion of Siaya/U mala/138 contravened the common law doctrine of lis pendes and his action could not defeat the plaintiff's claim. Nonetheless, this cannot be said of Siaya/U mala/139.
39. The 2nd defendant's entry as a registered owner of Siaya/U mala/139 in 2011 stopped time from running and a claim of adverse possession could not suffice against this suit property. Consequently, I find that as at the time of filing suit, the plaintiff had been in exclusive, peaceful and continuous possession of the entire Siaya/U mala/138 measuring 2.2 acres for a period of over 12 years. I also find the plaintiff was not in possession of Siaya/U mala/139. See Peter Kamau Njau (Supra).
40. On the element of the registered owner being dispossessed or had discontinued his possession, from evidence, to the time of filing suit, the 1st defendant had never occupied Siaya/U mala/138 meaning he had been dispossessed.
41. As to res judicata, the doctrine of res judicata is provided for under Section 7 of the *Civil Procedure Act* in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

42. For the doctrine of res judicata to suffice, it must be on a previous suit in which the matter was in issue, the parties were the same or litigating under the same title, a competent court heard the matter in issue and the issue had been raised once again in a fresh suit. See the Supreme Court of Kenya decision of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.
43. In Ukwala ELC Case No.30 of 2018, the plaintiff’s claim of trust against the 1st to 3rd defendants over the suit properties was heard and determined by a competent court on merits and his case was dismissed with costs. However, the lower court declined to exercise jurisdiction over adverse possession. In other words, adverse possession was never heard and determined on merits. Consequently, I find this suit is not res judicata.

c. What orders should this court issue including an order as to costs of the suit?

44. Ultimately, for the foregoing reasons and findings, I find on a balance of probabilities, the plaintiff did prove all elements of adverse possession against Siaya/U mala/138 but not against Siaya/U mala/139. I hereby allow his claim against Siaya/U mala/138 and dismiss his claim against Siaya/U mala/139. It is trite law costs follow the event and each party shall bear their respective costs. To this end, this court hereby makes the following disposal orders: -
- a. The plaintiff’s suit is hereby struck out against the 3rd defendant.
 - b. The plaintiffs’ suit is hereby dismissed against the 2nd, 4th and 5th defendants.
 - c. A declaration that the title in the name of Michael Omay a in respect of land parcel no. Siaya/U mala/138 has been extinguished by the plaintiff’s adverse possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.
 - d. That the plaintiff has become entitled by adverse possession to Siaya/U mala/138 that is registered in the name of Michael Omay a.
 - e. An order that the Land Registrar Siaya register the plaintiff as absolute proprietor of land parcel no. Siaya/U mala/138 in place of Michael Omay a.
 - f. That the Land Registrar Siaya be directed that the order herein shall be an instrument of transfer of ownership of the whole of land parcel no. Siaya/U mala/138 from the name of Michael Omay a to John Odhiambo Adala.
 - g. That each party shall bear their respective costs.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF MARCH 2024.

HON. A. Y. KOROSS

JUDGE

21/03/2024

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

In the Presence of:



Mr. Ogonda for the 3rd defendant

N/A for the plaintiff

Plaintiff present in person

Court assistant: Ishmael Orwa

