



Omollo v Paulus & 2 others (Enviromental and Land Originating Summons E021 of 2022) [2025] KEELC 840 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E021 OF 2022
E ASATI, J
FEBRUARY 27, 2025**

BETWEEN

PETER OTIENO OMOLLO PLAINTIFF

AND

HENRY OMONDI PAULUS 1ST DEFENDANT

LAND REGISTRAR, KISUMU 2ND DEFENDANT

HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 20th September, 2022, Peter Otieno Omollo, the Plaintiff/Applicant herein, who claims to be entitled to the whole of land parcel known as Kisumu/Dago/835 by adverse possession sought for the following orders;
 - a. an order that the Plaintiff has been in adverse possession of the whole of Kisumu/Dago/835 for a period of over 12 years.
 - b. an order that upon the expiry of 12 years since the Plaintiff was in possession of Kisumu/Dago/835, 1st Defendant's rights over the land got extinguished by the operation of the law.
 - c. an order that the Defendant holds the parcel number Kisumu/Dago/835 in trust for the Plaintiff.
 - d. an order that the said parcel of land number Kisumu/Dago/835 be transferred to the Plaintiff and the Plaintiff be registered as the owner thereof.
 - e. an order that the Defendant do execute all the transfer documents in favour of the Plaintiff and in event of default, the Executive Officer of the honourable court be empowered to execute the same to give effect to the aforesaid orders.



- f. An order that the Defendant do remove any person he may place therein by an order of eviction from parcel of land number Kisumu/Dago/835.
 - g. an order that the Defendant do meet costs of the suit.
 - h. any other relief the honourable court may grant in the circumstances.
2. The Originating Summons was supported by the averments in the Supporting Affidavit sworn by the Plaintiff on 20th September, 2022.
3. The 1st Defendant filed no response to the claim. Affidavit of Service sworn by Washington Athunga Advocates on 14th March, 2023 shows that the 1st Defendant was served on 28th February, 2023 by registered post through P.O. Box 1358, Kisumu.
4. Affidavit of service sworn by Moses Omondi Ogada on 14th March, 2023 indicates that the 2nd and 3rd Defendants were served on 28th February, 2023. They filed Grounds of Opposition dated 15th November 2022 in opposition to the Originating Summons.

The evidence & submissions

5. The Originating Summons was disposed of by way of viva voce evidence.
6. The Plaintiff testified as PW1. He adopted the contents of his witness statement dated 19th October, 2022 and Supporting Affidavit sworn on 20th September, 2022 as his evidence. He had stated in the Supporting Affidavit that the suit land was left to him by the 1st Defendant to take care of and live on in the year 1999. That he has since been living in the whole land and farming the same with his family without any interference from the owner. That he has tried to trace the 1st Defendant since the year 2000 to date but to no avail and that the Defendant moved out from the area. That he had had possession of the land for 20 years without interference from the owner. That he therefore prays that he be declared the owner of the land by adverse possession. Similar facts were stated in the plaintiff's witness statement filed in court on 19th October, 2022.
7. The Plaintiff produced documents as exhibits namely; copy of register (green card) and copy of certificate of official search for the suit land.
8. No evidence was tendered by the Defendants. And no submissions were filed by the parties.

Issues for determination

9. One issue presents itself for determination herein namely; whether or not the Plaintiff/applicant has obtained title to the suit land by adverse possession. The finding on this issue will answer the other questions on the Originating Summons.
10. Adverse possession is a legal doctrine vide which a person obtains title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on provisions of sections 7, 13 and 38 of the *Limitation of Actions Act*. 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.”



11. Adverse possession or prescription is one of the legally recognized methods of acquisition of title to land vide as listed in section 7 of the [Land Act](#). Section 28 of the [Land Registration Act](#) lists rights to land acquired by virtue of adverse possession as overriding interests to which registered land is subject.
12. However, for a claim based on adverse possession to land to succeed there are elements that the claimant must prove on a balance of probabilities. Firstly, the claimant must prove that the subject land belongs and is registered in the name of the defendant. The law requires in Order 37 Rule 7 Civil Procedure Rules that to the Affidavit in support of the Originating Summons there be annexed a certified extract of title to the land in question. The essence of this requirement is to confirm from the very onset of the proceedings the existence of the land the subject matter of the Originating Summons and the fact that the same is registered in the name of the name of the person sued.
13. In the present case, the plaintiff annexed to his Supporting Affidavit a copy of register in respect of the suit land. It shows that the suit land measuring 0.29 Ha belonged to Henry Omondi Paulus Madere in whose name it was registered on 14th June 1974.
14. The other element of adverse possession is that the claimant's entry and presence on the suit land must be with the knowledge but without the permission or consent of the owner.
15. The Court of Appeal in Mombasa in the case of Mombasa Teachers Co-operative Savings and Credit Society Limited vs Robert Muhambi Katana & 15 Others [2018] eKLR held that-

“Likewise, it is settled that a person seeking to acquire title by way 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 un-interrupted period of 12 years as espoused in the Latin maxim of *nc 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 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.”
16. Also in in the case of *Beatrice Syokau Gathumba vs Kenya Airports Authority & 2 Others* [2012] eKLR where the court held as follows:

“I must emphasize that it is an element of adverse possession that it ought to be ‘hostile’ and without permission from the true owner of the land. The fact that the petitioner's husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because an intruder who is given permission or a license has no cause of action during the period of his permission or license. This position was stated in the case of *Wanje v Saikwa*, Civil Appeal No. 72 of 1982 (1984) KLR Pg. 284, wherein the Court of Appeal held that; ‘A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in the reality he has not dispossessed the owner of the land and the possession is not illegal.’ This was also confirmed in the case of *Wambugu v Njuguna*, Civil Appeal No 10 of 1992 where it was stated that;

“...an appellant must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined.”



17. The Plaintiff herein states that the suit land was left to him by the 1st Defendant to take care of and live on. In paragraphs 2 and 5 of the Supporting Affidavit he stated;

“That I state that the land parcel Kisumu/Dago/835 was left to me by the defendant herein to take care of and to live on in the year 1999.

That since I was placed on the land by the owner, the Defendant herein, I have tried to trace him from the year 2000 to date but to no avail and he moved out from the area”

18. This to me means that he is a caretaker of the land present on the land with the permission and/or consent of the 1st Defendant. There is no evidence that the permission or consent of the 1st Defendant has ever been terminated.

19. The Plaintiff claimed that there has been no interference from the Defendant in respect of his occupation and/or possession of the suit land for the past 20 years. Although peaceful, open, actual, exclusive, continuous and uninterrupted possession of the land is another element of adverse possession, no evidence was placed before court to show that the plaintiff had had this kind of possession of the land.

20. The Plaintiff claimed to be doing farming activities on the suit land. No evidence was availed to demonstrate this or any other developments carried out on the land by the Plaintiff to prove his possession. The burden of proof, under the provisions of sections 107 to 109 of the Evidence Act, was with the plaintiff to prove his claim.

Section 107(1) provides

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

The plaintiff has not discharged the burden.

21. The case of the 2nd and 3rd Defendants as contained in their grounds of opposition is that they were misjoined in the suit and that the joinder was in bad faith and an abuse of both court practice and the law. They further contended that a claim of adverse possession is not sustainable as the essential pre-requisites had not been proved. They relied on the cases of Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (suing in her capacity as the administrator of the estate of KImimngi Wariera Deceased and of Mwangi Kimingi Deceased [2022]eKLR and Mtana Lewa -vs- Kahindi Ngala Mwangadndi [2015]eKLR where it was held that adverse possession is neither by force or stealth or under license of the owner. That adverse possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title of the owner.



22. From the foregoing, the court finds that the plaintiff's entry and possession of the suit land, if any, was with the permission and/or consent of the 1st Defendant, the registered owner of the land and secondly that no evidence has been placed before court that the plaintiff had had actual, peaceful, open continuous and uninterrupted possession of the suit land for the prescribed period. For these reasons, I find that the Plaintiff has failed to prove his claim based on adverse possession on a balance of probabilities. The suit commenced vide the Originating Summons dated September 20, 2022 is hereby dismissed. No order as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Nyagol for the Plaintiff/ Applicant.

No appearance for the Respondent.

