



REPUBLIC OF KENYA



**Ogeda v Hessein (Enviromental and Land Originating Summons
E011 of 2023) [2024] KEELC 1579 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023**

E ASATI, J

MARCH 18, 2024

BETWEEN

BENSON OTIENO OGEDA PLAINTIFF

AND

MAQBOOL HESSEIN DEFENDANT

JUDGMENT

1. The applicant, Benson Otieno Ogeda brought the Originating Summons dated 14th March, 2023 seeking for orders against the Respondent that;
 - a. the applicant be declared entitled by adverse possession of and more than 12 years to all that piece of land registered in the Land Registry situated in Kisumu as Kisumu/Kogony/1799.
 - b. the applicant be registered as the sole proprietor absolutely of the said parcel of land.
 - c. the applicant has an overriding interest under section 28(h) of the *Land Registration Act*, No.3 of 2012 of the identified land parcel Kisumu/Kogony/1799.
 - d. the court vests the suit land to the applicant.
 - e. costs of this application be provided for.
2. The grounds upon which the Originating Summons was brought are that the applicant has been living on the suit land since April 2010 to date, that the applicant has been in constant occupation of the suit property without force, without secrecy, without permission, without interruption for a period of more than 12 years. That the applicant has built a permanent home and has acquired interest on the land capable of registration.
3. The Originating Summons was supported by the averments in the Supporting Affidavit sworn by the applicant on 14th March, 2023 and the annexures thereto.



4. The Respondent who was served with the Originating Summons by way of substituted service by advertisement in the Newspaper never responded to the Originating Summons. The matter therefore proceeded to hearing without his participation.
5. The applicant's evidence was comprised of his testimony and the exhibits be produced. He relied on the contents of his Supporting Affidavit as his evidence in chief. He deposed in the Supporting Affidavit that he had had occupation of the suit land since the year 2010 where he has built his home. That the Respondent who is the adjudicated owner/proprietor of the property can only be presumed to be holding the title of the suit land in trust for him, having lived on the land for over 12 years.
6. Further that he has been in constant occupation of the suit property without force, secrecy, permission, interruption for a period in excess of 12 years. That in the circumstances, the Respondent is holding the title in trust for him and according with section 28 of the [Land Registration Act](#), he is entitled to be registered as owner in place of the Respondent.
7. The applicant produced photographs, copy of adjudication record and RIM maps as exhibits to show that the suit land is registered in the name of the Respondent and to show the developments on the suit land.
8. Vide the written submissions dated 31st October, 2023 filed by the firm of Otieno, Yogo, Ojuro & Company Advocates on behalf of the Applicant, it was submitted that the issues for determination in this matter are whether the Plaintiff can claim adverse possession and whether he is entitled to the prayers sought and secondly, whether the Plaintiff has an overriding interest under section 28(h) of the [Land Registration Act](#) No.3 of 2012. Counsel submitted that section 107 of the [Evidence Act](#) cap 80 Laws of Kenya provides that when one wishes that the court enters judgement in support of a certain fact that person should prove the existence of that fact. That the burden of proof in the case rests with the Plaintiff.
9. Counsel submitted that it is trite law that for a claim based on adverse possession to succeed, the claimant needs to demonstrate that he has been in open, quiet and continuous possession of the claimed property for a period in excess of 12 years. Counsel relied on sections 7, 13 and 17 of the [Limitation of Actions Act](#) and submitted that Section 17 extinguishes the right of the registered owner.
10. Counsel further relied on the case of Wilson Njoroge Kamau –vs- Nganga Muceru Kamau ELC No.259 of 2017 (OS) where it was held that the combined effect of the sections of the [Limitation of Actions Act](#) quoted is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation by the adverse possessor. Counsel further relied on section 28(h) of the [Land Registration Act](#) and the case of Kasuve –vs- Mwaani Investments Limited and 4 other IKLR 184.
11. Counsel further relied on the case of Kisumu Civil Application No.110 of 2016, Richard Wafwafwa Songoi –vs- Ben Munyifwa Songoi [2020]eKLR where the Court of Appeal held that a person claiming adverse possession must establish on what date he came into possession, what was the nature of his possession, whether the fact of his possession was known to the other party, for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years.
12. That the applicant contended that he entered the parcel of land in the year 2010 and that the Defendant has never occupied or worked on the land parcel number Kisumu/Kogony/1799 and that the Plaintiff has never been dispossessed of it.
13. Reliance was also placed on Kisumu Civil Appeal No.27 of 2013 [Samuel Kihamba v May Mbaisi](#) [2013] eKLR where it was held that for one to succeed in a claim for adverse possession one must



prove and demonstrate that he had occupied the land openly that is, without force, without secrecy and without license or permission of the land owner with the intention to have the land.

There must be an apparent dispossession of the land from the land owner. That these elements are contained in the latin phraseology: *nec vi, nec clam, nec precario*. That the additional requirement is that of *animus possidendi*, or intention to have the land. Reliance was also placed on the case of Nairobi Civil No.283 of 1990 *Gabriel Mbui v Mukindia Masanga* [1993]eKLR where it was held that the character of the possession must be established as a fact.

14. Counsel submitted further that section 28(h) of the *Land Registration Act* recognizes adverse possession as an overriding interest. Counsel relied on the provisions of section 38 of the *Limitation of Actions Act* and the case of *Gerald Muriithi -vs- Wamugunda Muruiuki & another* (2010) eKLR in which reference was made to the Court of Appeal decision in *Wambugu v Njuguna* (1983) KLR. Counsel urged the court on the basis of the evidence before court to find that the Plaintiff has proved and satisfied the ingredients of adverse possession.
15. I have considered the uncontroverted evidence of the applicant. To prove the existence and ownership of the suit land the applicant produced a land adjudication record for the suit land. Order 37 of the *Civil Procedure Rules* requires that an extract of title of the suit land be annexed to the Affidavit in Support of the Originating Summons. Order 37 rule 7 provides that.

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- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
- (2) The Summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and what manner the Summons shall be served.”

16. The law requires an extract of the title to the suit land to be annexed to the Affidavit in support of the Originating Summons. In my view the purpose is to demonstrate from the very inception of the suit that the suit land exists and that it is registered in the name of the person against whom the orders under section 38 of the *Limitation of Actions Act* are being sought in the Originating Summons. An adjudication record is one of the basic documents prepared under the *Land Adjudication Act* in preparation for registration of land. The record and the entire adjudication register is subject to alterations and amendments pursuant to the provisions of the *Land Adjudication Act* and other transactions. The adjudication record cannot be evidence of the current status and ownership of the suit land by the defendant or during the period of adverse possession. The law mandatorily requires for an extract of the title which to my mind is either the copy of register (green card) or certificate of official search duly certified and not an adjudication record. It has been held that Certificate of Official Search suffices for the purposes of order 37 rule 7 (2) see *Johnson Kinyua v Simon Gitura Rumuri* [2011] eKLR where the Court of Appeal held that:-

‘Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the *Registered Land Act* and a search certificate under the *Registered Land Act* duly signed by the Registrar constitutes evidence of the entries set out in the certificate’.



17. And in the case of *Noah Onyango Amwayo v Sylvanus O Otumba & another* [2013] eKLR the court held that adjudication record is not evidence of title.
18. The upshot of this is that the applicant has not complied with the requirements of order 37 with the result that he has not proved that the suit land exists and is registered in the name of the defendant. The relief of adverse possession is available only where there is a registered owner of the land against whose title time for adverse possession runs.
19. Further, one of the ingredients of adverse possession as rightly submitted on behalf of the applicant is that the applicant's occupation of the suit land must be open and known to the Defendant. It is the possession of the land by the adverse possessor and the failure by the registered owner, who is aware of the possession, to assert his/her title that sets the time running in favour of the adverse possessor. In the present case, there is no evidence that the fact of the applicant's occupation of the suit land was known to the Defendant. The Defendant's whereabouts were said to be unknown hence the reason for service of the Originating Summons and other court processes by substituted service.
20. For lack of evidence that the suit land exists and was during the period of the adverse possession and is currently registered in the name of the Defendant, and lack of evidence that the fact of the applicant's adverse possession of the suit land was known to the Defendant, the court finds that the applicant has not proved his case on a balance of probabilities. The case is hereby dismissed.

No order as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 18TH DAY OF MARCH, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Miss Anyango for the Applicant.

No appearance for the Respondent.

