



REPUBLIC OF KENYA



Ojwang v Otieno (Civil Appeal 50 of 2019) [2024] KECA 857 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KECA 857 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 50 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 19, 2024**

BETWEEN

RISPER ATIENO OJWANG APPELLANT

AND

MARGARET OCHOLA OTIENO RESPONDENT

(Being an appeal from the Judgment of the Environment at Migori (G.M.A. Ongondo, J.) dated 11th December 2018 in ELC Case No. 779 of 2017)

JUDGMENT

1. The appellant, Risper Atieno Ojwang, who described herself as the registered owner of LR. No. Kamagambo/Kabuoro/843, sued the respondent, Margaret Ochola Otieno, vide a plaint dated 16th December 2013 and filed on 17th December 2013 for the following reliefs:
 - i. Declaration that the appellant is the registered and/or lawful owner of LR. LR. No. Kamagambo/Kabuoro/843.
 - ii. An order of eviction against the respondent from LR No. LR. No. Kamagambo/Kabuoro/843.
 - iii. A permanent injunction against the respondent and/or her agents from in any way interfering with the suit land.
 - iv. An order compelling the Land Registrar Migori to remove/vacate the caution endorsed in the register in respect of the said parcel.
 - v. General damages for trespass.
 - vi. Costs and interest.



2. The respondent, on the other hand, vide an originating summons dated 20th February 2014, counter claimed that she had acquired the suit land by adverse possession having been in possession of the same for over 12 years; and that the suit land should be registered in her name.
3. It is the appellant's case that the suit land was originally registered in the name of her eldest son, Godfrey Omondi Otieno, who later transferred it to her; and she got registered as the owner in November 1997. The respondent lodged a caution to be restricted on the title to the suit land in September 2001 and caused a rectification to be registered over the title in August 2003. Thereafter, the respondent entered the land; cultivated thereon; and even erected some temporary structures, thus depriving her of her exclusive rights over the land.
4. The evidence of the appellant, who testified at the trial as PW1 was that she purchased the land from the respondent's deceased husband, in the respondent's absence, although she did not have any documents to support her claims of a sale agreement, nor could she recall how much was paid as purchase price. She also confirmed that neither herself, nor her son or husband had ever occupied the land in question; and that when her son filed a suit to wit Kisii HCCC No. 2313 of 1985, against the respondent, where the appellant was enjoined as an interested party, the matter was dismissed for want of prosecution.
5. The respondent on the other hand testified that she had lived on the suit land which she described as Kamagambo/Kabuoro/57, with her late husband, Lucas Otieno Odero, since 1958 when she got married to her deceased husband; and had enjoyed uninterrupted occupation of the whole suit land; that she had a home thereon; and her married son had also established his home there; and she had no claims to Kamagambo/Kabuoro/843. She did not know the appellant, whom she accused of unlawfully and fraudulently getting herself registered as the owner of the land, yet she did not have any documents to prove purchase of the said land from her late husband. She urged the trial court to dismiss the suit.
6. The trial court in its judgment framed 3 issues for determination:

Firstly, whether the appellant was the registered proprietor of the suit land and Secondly, whether the respondent had legitimate rights over the suit property and lastly whether the parties were entitled to the reliefs sought in their respective pleadings.
7. On the first issue, the trial court noted that the appellant claimed being the registered owner of the suit property which was initially registered in the name of her eldest son; that the respondent in her pleadings admitted that the appellant is indeed the registered proprietor of the suit land. The court, from the pleadings and evidence before it, found that it was common ground that the appellant was indeed the registered proprietor of the suit property.
8. The court also noted that any transaction on the suit property by the appellant was void for want of consent under section 6(1) of the [Land Control Act](#) and that the title deed produced by the appellant was suspect as due process was not followed in obtaining it.
9. With regard to the respondent's rights over the suit land, from the evidence of the respondent that she was in occupation of the suit land and the admission by the appellant and her assertion during her evidence that neither her deceased husband nor her son ever occupied the suit land, whereas the respondent had occupied and tilled the land, leading to the conclusion that the respondent was indeed in sole possession of the suit land.
10. From the evidence presented, the trial judge was satisfied that the respondent had been in open and notorious occupation of the suit land for a period in excess of 12 years, she had cultivated the land and her son lives thereon and as such effectively dispossessed the appellant from the land; that the appellant



had not proved her case against the respondent on a balance of probabilities, whereas the respondent had proved her counter claim on balance of probabilities. The trial judge thus dismissed the appellant's suit and allowed the respondent's counter claim as prayed in her Originating Summons.

11. The appellant, aggrieved by the decision of the trial court, has challenged its judgment on 4 grounds of appeal. Firstly, the appellant argues that even if the respondent were to be given the suit land in question, she ought not to get the whole parcel. Secondly, the appellant argues that no fraud was pleaded nor proved. Thirdly, that the judgment of the court offended the provisions of the Government Proceedings Act as actions of Government Officers were challenged without involving the necessary Government Departments, and, lastly, that the Environment and Land Court ignored that the respondent's pleadings challenged the process of registration, but proceeded to make a determination on adverse possession.
12. The respondent basically argues that her claim was on adverse possession; that was what the trial court considered and awarded; that the appeal is baseless and should be dismissed. In her written submissions the respondent reiterates the findings by the trial court, and urges us to dismiss this appeal as unmerited.
13. This being a first appeal, and as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
14. In our considered view, the main issue in this appeal is whether the respondent acquired title to the suit property under adverse possession. One of the essential elements of the doctrine of adverse possession is that there must be sufficient degree of physical contact on the land and that possession of the land must be actual, notorious, exclusive and continuous; and apparent and manifest to the actual land owner.
15. The burden of proof is placed on the person alleging the occurrence of an event. Owing to the nature and extent of orders for adverse possession to wit extinction of the right to property, the burden is higher and lays squarely on the respondent to demonstrate that he/she has met the requirements for grant of an order of adverse possession. (See COA App No. 95 of 2014 *Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui* [2017] eKLR).
16. This Court, in *Kisumu Civ. App. No. 110 of 2016 Richard Wefwafwa Songoi vs. Ben Muniyifwa Songoi* [2020] eKLR held that a person claiming adverse possession must establish the following:
 - i. On what date he came into possession.
 - ii. What was the nature of his possession.
 - iii. Whether the fact of his possession was known to the other party.
 - iv. How long his possession continued and
 - v. That the possession was open and undisturbed for the requisite 12 years.
17. To determine the nature of possession this Court in *Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba vs. Mary Mbaisi* [2015] e KLR held:

“strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without



license or permission of the landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”

18. From the evidence on record, the Green Card which was produced as exhibit showed that the suit land was initially registered in the name of the appellant’s eldest son, Godfrey Omondi Otieno on 29th June 1972 when a Land Certificate was issued to him. However, as at the time of the suit he had transferred it to her; and the land was registered in her name as sole proprietor on 5th November 1997, as reflected in the Green Card. It is further on record that the appellant’s husband purchased the suit property from the respondent’s deceased husband, in fact on cross examination the appellant claimed that her son Godfrey bought the parcel from the respondent’s late husband in 1991, as the respondent and her husband were in occupation; in the same breath, she also stated that it was actually her husband, Isaiah Otieno Ojwang, who purchased the land from the respondent’s late husband. The appellant could not recall how much was paid as the purchase price, nor did her late husband leave her with any documents with regard to the sale.

We take note that the respondent admitted that the appellant was the registered owner, settling the question as to who is the registered owner of the suit land.

19. As regards adverse possession, the appellant submits that even if the respondent were to be given the land in question, she ought not to get the whole parcel as the suit land measures 12.6 Ha. which is about 31.13 Acres. This is a blanket statement with nothing offered to justify it, no evidence that the respondent was only claiming part of the land, and indeed no evidence that she only used or occupied a specific portion. What we find, is that there is evidence on record confirming the appellant’s admission that the respondent has been cultivating the land; and has been in occupation of the suit land since 1958 when she married the deceased husband. The appellant having been registered as the proprietor in 1997, then time begun to run as of that date, and by 2019 when this suit was filed, the 12 year period had matured. We note that the High Court in its judgment observed that it was the appellant’s testimony that she had not done anything on the suit property, she also acceded to the fact that neither her late husband, who died in 1989 nor her son, Godfrey, ever occupied the suit land.
20. Although the appellant had the title, it was overrun by the respondent’s adverse possession; and by September 2001, the respondent had lodged a caution, yet it took the appellant another 12 plus years before filing suit on 16th December 2013 by which time, adverse possession had taken root. This Court agrees with the findings of the Environment and Land Court that the respondent had clearly been in open and notorious occupation and possession of the suit property for over 12 years and that this possession effectively dispossessed the appellant from the suit land.
21. With regard to the appellant’s lament that the judgment of the court offended the provisions of the Government Proceedings Act as actions of Government Officers were challenged without involving the necessary Government Departments, that is a sweeping statement that has not been adequately argued; and in any case, it would not shift the ground as regards the question of adverse possession.
22. We thus concur with the learned judge in his findings dismissing the suit, and making a finding in favour of the respondent. The upshot of the same is that the appellant’s appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024.

HANNAH OKWENGU

.....
JUDGE OF APPEAL



H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

