



**Gumba (Suing as the legal administrator of the Estate of Aloyce Gumba Oloo (Deceased) v Nenga alias Oduor Nenga (Environment and Land Case E029 of 2022) [2024] KEELC 3570 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3570 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND CASE E029 OF 2022**

**AY KOROSS, J**

**APRIL 11, 2024**

**BETWEEN**

**JOHN ODHIAMBO GUMBA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ALOYCE GUMBA OLOO (DECEASED) ..... PLAINTIFF**

**AND**

**JOHN ODUOR NENGA ALIAS ODUOR NENGA ..... DEFENDANT**

**JUDGMENT**

1. This suit is instituted by an originating summons (OS) dated 20/12/2022 in which the plaintiff sought to be deemed an adverse possessor of a portion of 1.2 Ha. (disputed portion) of land parcel no. North Ugenya/Masat/1779 (suit property) which measures 7.2 Ha. The suit property is registered in the defendant's name.
2. The OS is supported by the affidavit of the legal administrator and son of the plaintiff one John Odhiambo Gumba (Gumba) which he deposed on even date. The affidavit has several annexures attached to it.
3. Despite service, the defendant did not file any documents to refute the plaintiff's claim and therefore, the plaintiff's claim is undefended. It is the plaintiff's case that he has allegedly acquired the disputed portion by adverse possession and seeks the following reliefs from this court: -
  - a. A declaration the defendant's rights over the disputed portion is extinguished by adverse possession.
  - b. The plaintiff be awarded title over the disputed portion.



- c. An order of permanent injunction be and is hereby issued against the defendant permanently restraining him either by himself, his relatives, servants, workers, agents and/or any other persons claiming through him from interfering with the disputed portion.
  - d. Any orders the court may deem just and expedient.
  - e. Costs be provided for.
4. The suit proceeded by viva voce evidence and Gumba testified as PW1 and his evidence was led by his sister Beatrice Akoth Gumba who testified as PW2.
  4. Gumba's evidence is composed of his witness statement and documents he produced and marked as Pex.1- 9. It is his testimony the suit property is a subdivision of land parcel no. North Ugenya/Masat/1379 (mother parcel) of which the disputed portion was derived from because the plaintiff purchased 1.2 Ha. from the mother parcel. Apparently, the purchase took place on 11/08/1976.
  4. Further, he states the purchase price of ksh. 3,150/= was paid in full and upon such payment, the plaintiff immediately took possession of the disputed portion, commenced construction of dwelling houses and started cultivating the fields and eventually, he was buried therein.
  4. It is his testimony that notwithstanding the plaintiff's demise on 3/03/1995, his family continued living on the disputed portion with the defendant occupying other portions of the suit property.
  4. It is his case pleas to the defendant to transfer the disputed portion to the plaintiff had been unheeded and visits to government offices including the local administration and lands registry- Ugenya had been unfruitful. PW2's testimony corroborated Gumba's testimony.
  4. After hearing the plaintiff and closing the parties' cases, this court directed the plaintiff's counsel on record M/s. Odhiambo Odera & Ass. Advocates to file written submissions. The plaintiff's counsel complied by filing written submissions dated 13/12/2023. The defendant did not file any submissions.
  4. In the plaintiff's submissions, the plaintiff's counsel identifies 2 interrelated issues for determination -the 1<sup>st</sup> is whether the plaintiff has met the threshold of adverse possession and the 2<sup>nd</sup> is whether the plaintiff is entitled to the disputed portion.
  4. On these issues, counsel relies on Sections 7, 13 and 38 (1) of the Limitation of Actions Act and submits elements of adverse possession had been met by the plaintiff and relies on the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR which summarized the principles of adverse possession thus: -

“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 land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See Eliva Nyongesa Lusena & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur).”

### **Issues for determination**

4. I have considered the pleadings, adduced evidence and submissions. Being guided by well cited 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 proved his claim of adverse possession to the required standards.



II. What appropriate orders should be granted including an order as to costs.

### **Analysis and Determination**

4. The issues which were earlier recognised as arising for determination shall be addressed herein in a sequential manner: -

#### **I. Whether the plaintiff proved his claim of adverse possession to the required standards.**

14. The common law doctrine of adverse possession is statutorily underpinned in our [Limitation of Actions Act](#) and it is one of the ways of acquiring land in Kenya.

14. The relevant provisions are underpinned in Sections 7, 13 and 38 of this [Act](#) and from these provisions of law and settled case law, the onus is on the plaintiff who claims adverse possession to prove that he has met the threshold. See [Samuel Kihamba \(Supra\)](#).

14. A comprehensive legal framework of the doctrine of adverse possession is well outlined in the persuasive case of [Gabriel Mbui v Mukindia Maranya](#) [1993] eKLR in the following terms: -

- “(1) the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period...
- (2) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else...
- (3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied...
- (4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people...
- (5) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the incroacher (sic) or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it...
- (6) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land...
- (7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period...
- (8) the rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period...



(9) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession...”

14. When a claimant claims adverse possession, this court has to apply strict interpretation of the law on adverse possession. Further, in deciding such a claim, the claimant has to meet not one but all the elements of adverse possession.

14. Claims of adverse possession by purchasers of land who have not acquired title to land as the circumstances obtaining in this case have been addressed by numerous court decisions as shall be seen shortly. In the Court of Appeal decision of *Public Trustee v Wanduru Ndegwa* [1984] eKLR, Madan JA stated thus:-

“A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor: *Bridges v Mees* (1957) 1 Ch 475 at 484; referred to with approval by this court in *Mwangi Githu v Livingstone Ndete and Others*, CA No 24 of 1979 (unreported).

Whilst in this decision, Kneller JA explained as follows on the relationship between a vendor and purchaser in the following terms: -

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.”

The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees*, [1957] 1 Ch 475; and Simpson J (as he then was) in *Hosea v Njiru Ors*, [1974] EA 526 (K).”

14. In a more recent decision of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal explicated computation of time in agreements for sale in claims of adverse possession as follows: -

“On our part, we are of the view that there are four alternative timelines that could be used to compute when time began to run for purposes of the plaintiff’s claim for adverse possession. These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year the plaintiff took legal possession of the suit property. In 1970, the plaintiff constructed a house on the suit property and put his elder brother in actual physical possession and occupation. Subsequent to this year, the plaintiff continued to have actual as well as constructive possession of the suit property. As correctly established by the trial court, in 1971, the plaintiff together with the appellant went to the lands office in Muranga and found that the property was not registered in the correct names of the appellant. In 1978, counsel for the appellant Messrs Karuga Wandai & Co. Advocates, wrote a letter dated



18th August 1978 to the plaintiff/respondent indicating that the appellant had changed his mind to sell the suit property.”

14. From the evidence on record, the plaintiff entered into an undated agreement for sale with the defendant and the terms of the agreement were that the plaintiff had purchased 3 acres out of the mother parcel at ksh.3,150/=. This agreement was executed by the parties and witnessed by the assistant chief of Masat sublocation.
14. Gumba’s testimony that the agreement for sale was entered on 11/08/1976 was not controverted. In fulfillment of the terms of the agreement as seen from the agreement, the plaintiff paid a deposit of the purchase price of ksh.2,800/= leaving behind a balance of kshs. 350/=.
14. However, it is uncertain when the balance of the purchase price was paid but what is not in doubt is that it was settled. This is evident by the defendant’s undated letter to the district land registrar confirming the disputed portion had been sold to the plaintiff and he undertook not interfere with it. Although the letter is undated, from its contents, it is inferred it was written sometimes on 6/09/2013.
14. Gumba’s testimony that the plaintiff entered the disputed portion on 11/08/1976 was not controverted and although I am satisfied time could have commenced then, it was not feasible since the mother parcel had not been registered but rather was registered on 1/10/1977. Therefore, the plaintiff’s claim of adverse possession arose on 1/10/1977 which is 45 years to the time of filing suit.
14. Gumba tendered a bundle of photographs which demonstrated actual occupation of the disputed portion which showed houses, mature trees and a maize plantation existing on the suit property. From evidence, the plaintiff’s possession and those of his dependants was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value.
14. From evidence, the plaintiff’s possession of the suit property was nec vi, nec clam and nec precario and his possession continued uninterrupted and without force upto the date of his demise on 3/03/1995 and after his death, his dependants continued such occupation to the time of filing suit.

## **II. What appropriate orders should be granted including an order as to costs.**

26. Ultimately, for the reasons stated above, it is my ultimate finding the plaintiff proved his claim of adverse possession to the required standards. It is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiff which shall be borne by the defendant. In the end, I make the following final disposal orders;
  - a. A declaration be and is hereby made that the title for land parcel no. North Ugenya/Masat/1779 measuring 1.2 Ha. has been extinguished by Aloyce Gumba Oloo’s [deceased] adverse possession thereof for a period of more than 12 years in terms of the *Limitations of Actions Act*.
  - b. At the cost of the legal administrators of Aloyce Gumba Oloo’s estate, it is hereby ordered that within ninety (90) days from the date hereof, a subdivision and transfer be conducted by the Land Registrar, Ugenya/Ugunja or such other officer as shall be delegated by the Land Registrar, Ugenya/Ugunja to survey, ascertain and excise a portion measuring 1.2 Ha. within land parcel no. North Ugenya/Masat/1779 for purposes of registration in Aloyce Gumba Oloo’s [deceased] favour.
  - c. In default of compliance with the orders, the deputy registrar or authorized officer do execute all the necessary documents to confer a portion measuring 1.2 Ha. within land parcel no. North Ugenya/Masat/1779 to the name of Aloyce Gumba Oloo [deceased].



d. Costs to the plaintiff.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**11/04/2024**

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

In the Presence of:

Mr. Odera for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

