



**Odula v Wosianju (Environmental and Land Originating Summons
7 of 2019) [2024] KEELC 4455 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 7 OF 2019**

EC CHERONO, J

MAY 23, 2024

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 27 LAWS OF KENYA

AND

**IN THE MATTER OF THE PROVISIONS OF THE LAND
ACT, 2012 AND THE LAND REGISTRATION ACT, 2012**

AND

IN THE MATTER OF LAND PARCEL NO. BUNGOMA/ KIMININI/1

BETWEEN

FREDRICK GIGWA ODULA APPLICANT

AND

TITUS WANYONYI WOSIANJU RESPONDENT

JUDGMENT

1. The applicant filed an Originating Summons dated 20th March, 2019 under Section 7, 37 and 38 of the *Limitations of Actions Act* Cap 22; Order 37 rule 3 of the *Civil Procedure Rules* seeking the following orders;
 - a. The respondent's rights over a portion of land measuring two (2) acres comprised in land parcel no. Bungoma/Kiminini/1 got extinguished by adverse possession and upon expiry of twelve (12) years (statutory years) and the applicant be declared the absolute owner of the said portion measuring two (2) acres.
 - b. That the respondent and or his servants, agents, workers be perpetually barred and an injunction be issued from interfering with the said portion measuring two (2) acres.



- c. That the respondent do execute all relevant conveyancing documents to facilitate registration of the said parcel measuring two (2) acres into the applicant's name.
 - d. That costs of this originating summons be borne by the respondent.
2. The said Originating summons is premised on the Supporting Affidavit of the applicant sworn on 20th March, 2019.
 3. It is the applicant's case that he is the legal administrator of the estate of Elijah Odulah Kasire-deceased while the respondent is the absolute registered owner of land parcel no Bungma/Kiminini/1 (hereinafter referred to as 'the suit land') measuring 14.5 Ha. He stated that on or about 12th May, 1996 his father purchased 2 acres out of land comprised in the suit land at a consideration of Kshs. 160,000/= which sum was paid in full and acknowledged by the respondent. He stated that his father took vacant possession of the demarcated portion immediately after execution of the sale agreement. It was the applicant's case that they have been in occupation of the said 2 acres of the suit land since taking possession and occupation without any interruption or challenge for a period exceeding 12 years. He stated that that he has been in use of the said portion carrying out farming activities. The applicant urged the court to have the 2 acres excised and transferred to his name for the benefit of the estate of his deceased father.
 4. In his replying affidavit, the respondent denies that at no time did the said Elijah Odulah Kasire-Deceased occupy the suit land and further denies selling any part of his land to the applicant or anyone else. He deposed that the attached agreement for sale is a forgery and that his land is intact and is in his exclusive possession and use for over 30 years.
 5. After pre-trial directions were taken, the parties agreed to have the matter proceed by way of viva voce evidence. Thereafter, the matter was fixed for hearing and case proceeded on various dates. In support of his case, the applicant called four witnesses while the respondent called one witness.
 6. PW1 Fredrick Kigwa Odulali stated that he has filed the current suit on behalf of the estate of his father Richard Odulah Kasire-deceased who died on 8th January, 2018. He referred to his witness statement dated 20th March 2019 and sought to have it adopted as his testimony-in-chief. The witness also referred to his list of documents dated 20th March 2019 containing 5 items statement dated 20th and produced as P-Exhibit 1-5. He also referred to his supplementary affidavit sworn on 12th May, 2019 and sought to have it adopted as his further testimony-in-chief. It was his further evidence that after purchasing and taking possession of the two (2) acres of the suit land, his father built a house and a latrine. He also planted trees and did farming on the land. PW1 stated that when his father died, the respondent denied them the use of the land.
 7. On cross-examination, the witness stated that his father has lived on the suit land and he was well informed of the purchase and showed the relevant documentation. He testified that he (Fredric Odullah) was not living in the land at the time his father purchased the same but only came in the year 2000. He testified that after the purchase of the 2 acres, the portion was demarcated and boundaries fixed.
 8. On re-examination, he stated that he reported the respondent to the DO Tongaren over the dispute after the demise of his father.
 9. PW2 Martin Osere Wambudu Stated that on 12th May, 1996 he was performing/serving his community as a village Elder (mkasa) when he was requested to draw and witness a Sale of land agreement between one Elijah Odullah and the respondent herein. He testified that the agreed purchase price was Kshs.160,000/= which the purchaser paid in full.



10. In cross-examination, he stated that he has been a village elder for the last 27 years. It was his evidence that a surveyor who was present at the time of sale conducted a survey of the entire land and demarcated the 2 acres purchased. PW2 further stated that the purchaser (now deceased) was by then working in Nairobi and he build a temporary house and latrine and also planted trees on the land and left it under the management of one Zebedayo.
11. In re-examination, the witness stated that the respondent demolished the house of the deceased upon his death.
12. PW3 Walter Were Munialo Was referred to his witness statement dated 20th March, 2019 and sought to adopt as his testimony-in-chief. He reiterated the evidence of PW1 and PW2.He stated that he has also bought 2 acres comprised in the suit land from the respondent who has completely declined to transfer the same to him. In cross-examination, he stated that the land was surveyed in the presence of the area chief. It was his evidence that the deceased worked in Nairobi but would visit the land occasionally. In re-examination, he confirmed that the land had been demarcated and that the beacons are intact to date.
13. PW4 Zebedayo Lindweye was also referred his witness statement dated 20th March, 2019 which he sought to adopt as his testimony- in-chief. It was his evidence that upon purchasing the two acres, the deceased built a temporary house and a latrine and planted trees and maize. He testified that in the year 2002, he was left in charge of the 2 acres as a caretaker until the year 2017 when he handed over back as the caretaker to the deceased who died shortly thereafter. In cross – examination, he testified that he was not aware whether transfer procedures had been commenced. In re-examination, he reiterated his evidence as above.
14. DW1 Titus Wanyonyi Wasianju On his part was also referred to his witness statement dated 18th May, 2021 and his replying affidavit sworn on 7th May,2019 and sought to adopt both as his testimony-in-chief. He stated that the suit land belongs to his family and that he has shared it. It was his further testimony that he was registered as proprietor in the year 2002. In cross examination, it was his evidence that he did not sale his land to the deceased and that he was not aware that the deceased had died. When shown a green card indicating that he was registered as proprietor of the suit land on 3rd July, 1981 he insisted that he was registered in 2002.He however testified that he entered on the suit land in 1965. DW1 testified that the signature in the agreement appears to be his and that his wife Flora Nekesa was a witness to the agreement. He confirmed that Zebedayo Lindweye Ovi was the secretary to the agreement while Martin Osere was a witness. He confirmed that he sold land to PW3 and that he had not transferred the same to him.

Legal Analysis and Determination

15. I have Court considered the pleadings, attachments, submissions and authorities cited by both parties and find that the issues that commend for determination are as follows;
 - a. whether the applicant has acquired title to a portion of two(2) acres comprised in the suit land LR No.bungoma/kiminini/1 by way of adverse possession
 - b. Who will bear the Costs of this suit?

The principle of adverse possession are found under Section 7 of the *Limitation of Actions Act* which places a bar on actions to recover land after 12 years from the date on which the right accrued. It provides: 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.



- c. Further, section 13 of the same *Act* provides that adverse possession is the exception to this limitation:
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.'
- d. Finally, Section 38 of the *Act* provides that:

'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.'

In order to determine whether the respondents' rights accrued, the court must satisfy itself on the following questions:

- i. How did the respondents take possession of the suit property?
- ii. When did they take possession and occupation of the suit property?
- iii. What was the nature of their possession and occupation?
- iv. How long have the respondents been in possession?

On the first issue, it is clear from the evidence adduced that the applicant, Fredric Gigwa Odiulla brings this suit as the legal representative of the estate of Elijah Odiullah-deceased who is alleged to have come into possession of 2 acres of the suit land as a purchaser and now seeks to be registered as proprietor by operation of law under the doctrine of adverse possession. It is not contested that indeed the respondent sold to the deceased 2 acres of the suit land in the year 1996. Despite the sale, the respondent did not cause for a transfer of the 2 acres and no reason has been given to explain that.

- e. On the second issue on when did the applicants took possession of the suit property; the applicant testified that upon purchase and payment of the full consideration on 12th May 1996 his father (the deceased) took immediate occupation of the 2 acres which were later demarcated by surveyors and he constructed a house and latrine, planted trees and has been planting seasonal crops thereon. He stated that the deceased who worked in Nairobi at the time employed PW4 as a caretaker and he would visit from time to time. In the case of *Jandu*



vs Kirpal & Another [1975] EA 225 in which the court relied on the definition adopted in the case of *Bejoy Chundra vs Kally Posonno* [1878] 4 Cal 327 at p 329; and held as follows;

By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.

- f. It was the applicant's contention that since then, the respondents never made any attempts to disrupt the deceased's occupation until his demise in the year 2018 when he (the respondent) demolished the structures on the suit land and denied the applicant and the deceased's estate entry. It was argued that the deceased enjoyed uninterrupted and open occupation and possession of the 2 acres with the knowledge of the respondent who for a period exceeding 12 years did not in any way object to the said occupation. He stated that the respondent did not deny that the deceased was in possession of the 2 acres, but appears to suggest that he has no land capable of being adversely possessed since he has sub-divided the suit land to his family and has nothing to offer the applicant.
- g. It is now settled law that for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the *animus possidendi* (the intention to possess) to the exclusion of the actual owner are important factors in a claim for adverse possession. In my view and in full consideration of the parties' evidence, it is very clear that the applicant had possession of the suit property but the respondent is in denial of that fact.
- h. On the nature of their possession, the applicant is required to show beyond the mere occupation for a period exceeding 12 years. It is incumbent upon the applicant to show that their hostile intention to take over, occupy and use the suit property. From the evidence adduced, the applicant testified that the deceased's *animus possidendi* was open and manifested from the inception of the occupation by acts such as the construction of semi-permanent house and latrine, cultivation of land accompanied by the growing of crops and trees. It therefore follows that the deceased was in open and continuous possession of the said 2 acres of the suit land and remained in that capacity unchallenged by the registered owner far beyond the statutory period of twelve years. The applicant therefore, met all the requirements of an adverse possessor of the suit property as encapsulated in the legislation referred to elsewhere in this judgment.
- i. As to how long the applicant have been on the land, this court is in no doubt that the deceased's occupation has been for over 12 years uninterrupted. The respondent contends that he was registered as the proprietor of the suit land in the year 2002 after completing his payment to the Settlement Fund Trustee who was the initial registered proprietor. He (the respondent) however testified that he has been in actual possession since 1965. In my opinion, even if the time were calculated from the year 2002, 12 years would have crystallized by the time this suit was filed.
- j. In the upshot, I find that the applicant has proved on a balance of probabilities that: the deceased purchased and took possession of 2 acres of land comprised in the suit land; that the nature of this possession was adverse; that the fact of this possession was known to the respondent; that this possession had continued uninterrupted for over 12 years after



registration of the respondent as the proprietor and that the possession was open and undisturbed.

- k. In the final analysis, I hereby enter judgment for the applicants in terms of the originating summons dated 20th March, 2019. The Respondent shall bear the costs of this suit

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 23RD DAY OF MAY, 2024.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wanjala h/b Mr. Onyando for plaintiff
2. Mr. Ohuru appearing virtually
3. Respondent
4. Bett C/A

