



**Andai v Oseya (Environmental and Land Originating Summons
5 of 2022) [2024] KEELC 4937 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 5 OF 2022**

E ASATI, J

JUNE 13, 2024

BETWEEN

BATHOLOMEW OKINDA ANDAI APPLICANT

AND

JACKSON OKONDA OSEYA RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 14th September 2022 brought pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules and sections 37 and 38 of the [Limitation of Actions Act](#), the applicant sought for orders that: -
 - a. He be declared to have acquired title by adverse possession to the suit premises known as L.R. No. West Bunyore/Ekwanda/1782.
 - b. The claim by the Respondent as proprietor of L.R. No. West Bunyore/Ekwanda/1782 and/ or any other person deriving title from the Respondent based on the land be barred forthwith and the Land Registrar do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in place of the Respondent or anyone deriving title from the Respondent.
 - c. Costs of the proceedings be borne by the Respondent.
2. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the applicant on 14th September 2022 and the annexures thereto.
3. The Respondent opposed the Originating Summons vide the contents of his Replying Affidavit sworn on 1st March 2023 and the annexures thereto.
4. Directions under O. 37 Rule 19 Civil Procedure Rules were taken on 9th May 2023, inter alia, that the suit be disposed of by way of viva voce evidence.



The evidence

5. The Applicant testified as PW1. He adopted the contents of his Supporting Affidavit sworn on 14th September 2022 as his evidence in chief. He had deposed in the Supporting Affidavit that in the year 1976/1977 he had an arrangement with one Abisai Omuka Aywah alias Abisai Omuka, deceased, of land parcel known as West Bunyore/Ekwanda/1972 and in 1977 he took occupancy to date without any interference from the Respondent for a period of over 40 years. That he had buried his kin on the land, he established his home on the land and that his sons have their homes on the land. That his occupation of the land has been actual and open and with no interruption from the Respondent for over 45 years now.
6. He deposed further that he had learnt that the Respondent filed a Succession Cause to the estate of the deceased but did not include the suit parcel of land as part of the estate of the deceased. That the Respondent being the grandchild of the deceased is fully aware of the applicant's occupation of the suit land. That the chief, Assistant chief and the villagers are aware of his occupation of the suit land.
7. The applicant produced exhibits namely; Certificate of Official Search for the suit land, letter dated 29th May 2019, his National Identity card, letter dated 14th July 2019 and letter dated 17th June 2019.
8. On cross-examination, he stated that the registered owner of the suit land died. That Omuka (the deceased) sold him the land. That the land belongs to him and another person but the other person has sold his share.
9. The Respondent testified as DW1. He adopted the contents of the Replying Affidavit sworn on 5th March 2023 as his evidence. He had deposed in the Replying Affidavit that the suit is baseless, misconceived, maliciously filed and ultimately an abuse of the court process. That the suit land as at the time of filing suit was in the name of another person by the name of Abisai Omuka. That the applicant did not annex any extract of title to the Originating Summons. That the entry of the applicant onto the suit and his assumption of possession was pursuant to consent of the deceased – the registered owner thereof. That under those circumstances a claim of adverse possession cannot lie no matter the time that has lapsed.
10. The Respondent deposed further that he applied for Grant of Letters of Administration to the estate of the deceased. That the applicant filed an application in the succession cause which application was dismissed. That if indeed the applicant was a purchaser of the land then his claim has been extinguished by effluxion of time under the provisions of Section 7 of the *Limitation of Actions Act*. That the applicant's possession of the suit parcel has not been peaceful as there has been litigation.
11. The Respondent produced as exhibits; Grant of Letters of Administration, application filed by the applicant dated 22nd October 2019 seeking for revocation of grant, ruling and application dated 4th October 2021.
12. On cross examination, the Respondent stated that the suit land was registered in the name of one Abisai Omuka who is his grandfather. That he has been granted Letters of Administration to the estate of the grandfather. That the applicant entered the land in the year 1976/1977. That the applicant was claiming to have bought the land. That he knows that the applicant has his house on the land.

Submissions

13. Parties filed written submission on the suit. Written submissions dated 26th March 2024 were filed on behalf of the applicant by the firm of Samuel N. Mainga & Co. Advocates. Counsel framed one substantive issue for determination namely; whether the applicant has met the threshold for grant of



the orders of adverse possession. Counsel submitted that adverse possession accrues on land and not on title. Counsel relied on the decision in *Maweu vs Liu Ranching & Farming Cooperative Society* [1985]eKLR where it was held that adverse possession is a fact to be observed upon the land. Counsel relied on the case of *Mtana Lewa v Kahindi Ngala Mwangambi Civil Appeal No. 56 of 2014* [2015] eKLR where it was held that adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. That in Kenya the period is twelve (12) years Counsel relied on sections 7 and 38 of the *Limitation of Actions Act* and the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR.

14. Counsel submitted that from the evidence adduced it is clear that the applicant had been in actual possession of the suit land which occupation has been exclusive, open notorious continuous and uninterrupted for a period in excess of 12 years and hence adverse to the Respondent's title.
15. Written submissions dated 12th April 2024 were filed on behalf of the Respondents by the firm of Olel, Onyango Ingutya Advocates. Counsel framed one substantive issue for determination namely: whether or not the Plaintiff has acquired title to the suit land by operation of the doctrine of adverse possession. Counsel submitted that the applicant's mode of entry was as a result of a sale agreement which means it was a permissive one. That for a claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license.
16. Counsel relied on the case of *Mombasa Teachers Co-operative Savings and Credit Society Limited v Robert Muhambi Katana & 15 others* [2018]eKLR where it was held that a person seeking to acquire title to land by adverse possession must prove non-permissive, non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the latin maxim of *nec vi nec clam nec precario*.
17. Counsel submitted that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner in pursuance of an agreement for sale or lease or otherwise. Counsel relied among other case of *Sisto Wambugu v Kamau Njuguna* where it was held that a purchaser of land under contract of sale who is in possession of the land with the permission of the vendor pending completion cannot by a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from the date of termination of the contract
18. Counsel submitted that the applicant's evidence that he purchased the land from the deceased and has stayed thereon. That based on the sale agreement and the applicant's occupation having been permissive, it will follow that a claim of adverse possession may not issue. Further that the occupation has not been continuous as the applicant has on occasions reached out to the area Chief to intervene on the existing land dispute on the suit parcel. That it has been interrupted by virtue of the hearing and ruling in *Maseno Succession Cause No. 54 OF 2018*.
19. Counsel submitted further that the applicant claimed that he has been using the subject land exclusively and has been in occupation. That the applicant failed to bring any proof in the form of photographic evidence or a witness to support. That the applicant did not produce any evidence to show that he has put a home or planted a thing thereon.
20. That in a claim of adverse possession it is important that the land be clearly identified. Counsel relied on the case of *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakhswein & another* [2015]eKLR where the court observed that the identification of the land in possession is an important and integral part of proving adverse possession. That the suit property is registered in the name of the deceased who is not a party in the suit, and as such the claim cannot stand.



Issues for determination

21. From the pleadings filed and particularly the questions for determination contained in the Originating Summons, the evidence adduced and the submissions made the issues for determination that emerge are: -
 - a. Whether or not the applicant has acquired title to the suit land by adverse possession,
 - b. Whether or not the Respondent should be barred from claiming the suit land,
 - c. Whether or not the applicant should be registered as owner of the suit land,
 - d. Who pays the costs of the suit?

Analysis and determination

22. The first issue for determination is whether or not the applicant has acquired title to the suit land by adverse possession. The applicant pleaded in the Originating Summons that he has settled on the suit land continuously and without any inference from the deceased or the Respondent since the year 1977 and has had actual, open, physical and uninterrupted possession of the suit land. That he has fully developed the suit land. That he buried his kin thereon. That he has stayed on the land and all his family members built homes thereon and have been utilizing the land for over 40 years. That the Respondent has shown no interest in the land for the last over 40 years.
23. The applicant produced among his exhibits a certificate of official search in respect of the suit land to show that the suit land exists. The said Certificate of Official Search dated 29th May 2019 shows that the suit land was then registered in the name of ABISAI OMUKA and that a restriction had been placed on the title by the applicant.
24. It was submitted on behalf of the applicant that by reason of these matters the applicant had acquired title to the suit land by adverse possession.
25. The Respondent on the other hand contended that adverse possession had not been proved first because, the suit land was not registered in the name of the Respondent but in the name of Abisai Omuka, deceased, and hence adverse possession cannot lie. Secondly that the entry of the applicant onto the suit land was with the said Abisai Omuka's consent on the basis of an alleged sale agreement and the same was not adverse. Thirdly the Respondent contended that the applicant had not had peaceful and continuous occupation of the suit land as there had been litigation as evidenced by the letters produced as exhibits.
26. It was admitted that the applicant was in occupation of the suit land and resides thereon. The applicant pleaded that he entered thereunto in the year 1977. DW1 in cross-examination stated that the applicant entered the suit land in the year 1976/1977. There was no evidence by the Defendant that the deceased occupied any part of the suit land. The evidence produced also showed that the Defendant is the administrator of the estate of the deceased hence has capacity to be sued on behalf of the estate of the deceased. The Defendant stated that he had taken out Letters of the estate of the deceased Abisai Omuka. He produced a Grant of Letters of Administration dated 27th August 2019. Maseno PMCC. The suit herein was filed in the year 2022.
27. I find that the Respondent was the right person to be sued in respect of the estate of the registered owner of the suit land. I further find that adverse possession lies as against administrators of the estate of the registered owners of lands that are the subject of the adverse possession claims.



28. Regarding the entry of the applicant onto the suit land, indeed the applicant's evidence was that he entered the land on the basis of a land sale arrangement with the deceased. The land sale agreement was not produced as exhibit. The Respondent submitted that such entry was permissive and not adverse and that the consequent occupation of the land could not be adverse as long as the sale agreement was valid and awaiting completion. Courts have however held that entry onto land on the basis of a land sale agreement becomes adverse if the sale agreement fails but the buyer continues to have possession and the seller takes no steps to assert his title. The evidence shows that the applicant has occupied the land as of right since 1977. He testified that he established his own home and a home for his children thereon, he cultivates and buried his kin who died thereon with no interruption by the deceased or the Respondent. The Respondent admitted this and stated that the applicant entered the land in 1976/1977 and that the applicant has a home thereon.
29. In *Catthy Alucia Jebor Kiplagat v Vincent Komen Krelnut* [2018 eKLR] the court held that Adverse possession can be claimed where registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.
- Also in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR relied on in *Public Trustee vs Wanduru*, 1984 KLR 314 the Court stated that
- “adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run.”
30. There was no evidence that the sale agreement was still valid and awaiting completion.
31. The Respondent contended that the applicant had not annexed a certified copy of extract of the title to the Originating Summons thus rendering the Originating Summons defective. However, perusal of the Originating Summons shows that the applicant annexed a copy of certificate of Official Search to the supporting Affidavit. The same was signed and stamped by the Land Registrar. The essence of this requirement is to prove that the suit land exists and is registered in the name of the Respondent sued. A Certificate of Official Search duly signed by the land Registrar suffices and satisfies the requirement in 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’.
32. The next issue is whether the Respondent should be barred from claiming the suit land. Under Section 17 of the *Limitation of Actions Act*, the title of the deceased to the suit land became extinguished upon expiry of the limitation period. Since the applicant entered the suit land in the year 1977 twelve years from then elapsed around the year 1989. The deceased according to the Grant of Letters of Administration produced by the Respondent, died on 12th July 2003. The 12 years elapsed in his lifetime and by the time of his death his title in respect of the portion of the suit land occupied by the applicant had long become extinguished. He henceforth held the suit land in trust for the applicant. Under S. 28 (h) adverse possession is an overriding interest to which registered land is subject. I find that there is no basis for the Respondent to claim the suit land as the title of the deceased registered owner had become extinguished by effluxion of time.



33. On whether or not the suit land should be registered in the name of the applicant, on the basis of the findings already arrived at herein, the suit land ought to be registered in the applicant's name. The applicant testified that he occupies the suit land with another person who has already sold his portion. The applicant therefore is entitled to title to the portion of the suit land that he occupies.

Conclusion

34. On the basis of the foregoing determinations this court finds that the plaintiff/applicant has proved his case on a balance of probabilities and hereby enters judgement in his favour for: -

- a. A declaration that the applicant has acquired title by adverse possession to the portion he occupies of the suit premises known as L.R No. West Bunyore/Ekwanda/1782.
- b. A declaration that title of the registered owner of the suit land had become extinguished by effluxion of time.
- c. An order for transfer in favour of the applicant by the Respondent as administrator of the estate of the deceased, of the portion of the suit land occupied by the applicant.
- d. Each party to bear own costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Malanda h/b for Mainga for the plaintiff/Applicant.

C. Onyango for the Defendant/Respondent.

