



**Njera v Omondi (Environment & Land Case 664 of 2015)  
[2024] KEELC 4489 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 664 OF 2015**

**E ASATI, J**

**JUNE 6, 2024**

**(FORMERLY HIGH COURT CIVIL SUIT NO.123 OF 2011 (O.S.))**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION  
OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO. KISUMU/WATHOREGO/114**

**AND**

**IN THE MATTER OF ACQUISITION BY ADVERSE POSSESSION**

**BETWEEN**

**MARY AGUMBA NJERA ..... APPLICANT**

**AND**

**WILFRED CALEB OTIENO CHRISTOPHER OMONDI ..... RESPONDENT**

**JUDGMENT**

1. Vide the Originating Summons dated 28<sup>th</sup> July, 2011, stated to be brought pursuant to the provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, sections 1A and 3A of the *Civil Procedure Act* Cap 21 and section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the Plaintiff/Applicant, Mary Agumba Njera, who claims to be owner by adverse possession of land parcel No Kisumu/Wathorego/114 (the suit land) placed before this court three (3) questions for determination namely;
  - a. Whether or not the court should declare the Applicant the owner of land parcel No Kisumu/Wathorego/114 by dint of adverse possession.



- b. Whether the court consequently should order the Respondent to execute all relevant conveyance relating to land parcel No Kisumu/Wathorego/114 as to transfer the said land to the Applicant and in default the Deputy Registrar should do so.
  - c. Whether the costs of the Application should be granted to the Applicant.
2. The grounds upon which the Originating Summons was brought as shown on the face of the Originating Summons were that the Applicant had been in occupation of the suit land for an uninterrupted period of 47 years. That the occupation was effected without the consent of the Respondent. That the occupation has been open and notorious as against the Respondent but he has never interfered with the Applicant's occupation. That the Applicant was left in occupation of the said land by her husband the late Michael Njera Awiti and she had been in such occupation since 1964. And that whatever legal claim the Respondent had over the suit land has long been extinguished.
3. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the Applicant on 28<sup>th</sup> July, 2011 and the annexures thereto.
4. The Originating Summons was opposed vide the averments contained in the Replying Affidavit sworn by the Respondent, Wilfred Caleb Otieno Christopher Omondi, and the annexures thereto. The case of the Respondent was that he bought the suit land from Mr. Michael Njera Awiti in the year 1982 and got registered as owner on 11<sup>th</sup> July, 1995. That he has been visiting the suit land and has never seen any physical invasion on the land. That from the time he purchased the land in the year 1982 there had been absolutely no cultivation of maize, cassava or any other crops of any nature. That the Applicant had not had long occupation or user of the suit land. He denied that his interest in the suit land had been extinguished.
5. The court record shows that the suit was first filed on 9/8/2011 in the High Court at Kisumu as Kisumu HCCC No 123 of 2011 (OS) but that upon the establishment of the Environment and Land Court the suit was transferred to the Environment and Land Court Kisumu for hearing and disposal.
6. Directions were taken that the matter proceed as a suit commenced by way of plaint and the same be disposed of by way of viva voce evidence.

### **The Evidence**

7. The evidence produced by the Plaintiff comprised of his testimony and the testimonies of PW2, PW3 and PW4 and the exhibits they produced.

The Plaintiff adopted the contents of her witness statement filed on 9<sup>th</sup> August, 2011 as her evidence. In the said witness statement, she stated that she was the widow of one Michael Njera. That Michael Njera built their matrimonial home on land parcel No Kisumu/Wathorego/159 and pointed out to her land parcel No Kisumu/Wathorego/114 and directed her to be farming thereon. That she gathered from her husband that the land was ancestral land. That recently upon search at the lands office, she was shocked to discover that the parcel of land was registered in the name of Wilfred Caleb Otieno Christopher Omondi whom she did not know. That her occupation of the land has been uninterrupted since 1964.
8. The Plaintiff produced exhibits namely; Green card for parcel No Kisumu/Wathorego/114, demand letter dated 20<sup>th</sup> March, 2011, certificate of death for Michael Njera, certificate of Official Search for parcel No Kisumu/Wathorego/114 and photographs.
9. She denied that her husband sold the suit land. She stated that she had been planting potatoes, maize and sorghum on the suit land. PW2, PW3 and PW4 testified in support of the Plaintiff's case.



10. On behalf of the Defendant, the Defendant testified as DW1. He adopted the contents of his Replying Affidavit sworn on 23<sup>rd</sup> April, 2012 and his witness statement dated 11<sup>th</sup> June, 2020 as his evidence. He deposed in the Replying Affidavit that he bought the suit land in 1982 from Michael Njera vide the land sale agreement dated 1<sup>st</sup> February, 1982. That the agreement was witnessed by Zadock Odindo Ogola and Siprosa Adel Owiti, the mother of the Vendor. That the land was under Adjudication process then hence the agreement was witnessed by the Demarcation Officer Mr. Nashon Owuok. That he got title to the land on 11<sup>th</sup> July, 1995 and that the Plaintiff has not had long occupation of the suit land.
11. The Defendant produced land sale agreement dated 1<sup>st</sup> February, 1982 and title deed for the suit land as exhibits. He testified further that the temporary structure on the suit land was put up by him to declare his ownership of the land. And on cross-examination, he stated that he did not fence the land upon purchase and that he has never cultivated the same. That the suit land has never been under cultivation from the time he bought it.

### Submissions

12. Written submission dated 30<sup>th</sup> January, 2024 were filed on behalf of the Plaintiff by the firm of Ouma Njoga & Company Advocates. Counsel framed the issues for determination to be: -
  - a. Whether the court should declare the Plaintiff the owner of land parcel number No Kisumu/Wathorego/114 by dint of adverse possession;
  - b. Whether the court consecutively should order the Respondent to execute all conveyance relating to land parcel number No Kisumu/Wathorego/114 so as to transfer the said land to the Plaintiff and in default the Deputy Registrar to do so.
  - c. Whether the costs of this application should be granted to the Plaintiff.
13. On the issue on adverse possession, Counsel relied on section 38 of the *Limitation of Actions Act* and the case of *Wambugu v Njuguna* (1983)KLR 172 to submit that the Defendant as the registered owner of the suit parcel of land and title holder having never taken possession of the same from the time of registration and for a period exceeding 12 years therefrom, has no rights over the same as the rights have been extinguished and are now vested in the Plaintiff who has been in possession thereof without interruption for the requisite statutory period which is in excess of 12 years.
14. Counsel also relied on the case of *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR to submit that the right to be adverse to land does not automatically accrue unless the person in whose favour this right has accrued takes action. Counsel submitted that the ingredients of adverse possession as held in the case of *Mwachambi Ndwiga & another v Octavian Mwaniki Kariuki* [2021] eKLR were that adverse possession contemplates 2 concepts: possession and discontinuation of possession.
15. Relying on the case of *Maweu v Liu Ranching & Farming Company* where it was held that adverse possession is a fact to be observed upon land. That any man who buys land without knowing who is in possession of it risks his title just as he does if he fails to inspect his land 12 years after he had acquired it, Counsel submitted that the Plaintiff has proved to the required standard that she has acquired ownership of the suit land by dint of adverse possession and the court should make the order declaring her as such. Counsel also relied on the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* cited in *Muchambi Ndwiga case (supra)*.
16. On the next issue of whether or not the court should order the Respondent to execute conveyance so as to transfer the land to the Plaintiff, Counsel relied on the case of Wilson Kazungu Katana &



101 others v Salim Abdalla Bakshwein and submitted that the Plaintiff has proved her case. That the plaintiff identified the suit land by production of copy of green card in respect of the suit land thus confirming the existence of the same as required by law. That the Defendant ought to be ordered to execute all conveyance relating to the land parcel and in default the Deputy Registrar to do so. That the Plaintiff should be awarded costs.

17. Written submissions dated 13<sup>th</sup> March, 2024 were filed on behalf of the Defendant by the firm of K'Owinoh & Company Advocates. Counsel submitted that the Plaintiff cannot sustain a claim of adverse possession when she honestly believes that the land was hers. That it was on 18<sup>th</sup> March, 2008 that she discovered that the land was registered in the name of the Defendant. That the Plaintiff must prove that she was in possession; that the possession must be actual, visible, exclusive, open and notorious. That she must show that her entry into the land was with an evinced unmistakable animus possidendi that is to say with clear intention of excluding the true owner as well as other people. Counsel submitted further that, that was not the case in the instant suit. That the Plaintiff filed the suit only 4 years after discovering that the suit land was registered in the name of the Defendant. That the Plaintiff has failed to prove her case.

### **Issues for determination**

18. The issues as framed by Counsel for the Plaintiff encompass the questions raised in the Originating Summons for determination by the court. The same are hereby adopted as the issues for determination herein.

### **Analysis and determination**

19. Order 21 Rule 4 *Civil Procedure Rules* requires that judgment in defended suits consist of a concise statement of the case, the points for determination, the decision on each issue and the reasons for such decision. Guided accordingly I proceed to determine the issues herein.
20. The first issue for determination is whether or not the court should declare the Plaintiff the owner of the suit land by dint of adverse possession. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of the land to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on sections 7, 13, 17 and 38 of the *Limitation of Actions Act*. Section 7 provides for the period for which, if the registered owner takes no action to assert his title and recover the land, his right of action will cease in favour of the adverse possessor: 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.”

Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.
21. Section 17 provides that title of the registered owner is extinguished at the end of the limitation period that: -
- Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including redemption action) the title of that person to the land is extinguished.”
22. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the [Limitation of Actions Act](#) and Order 37 of the [Civil Procedure Rules](#), 2010
- Section 38 (1) provides;
- (1) 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
  - (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
23. And Order 37 Rule 7 [Civil Procedure Rules](#) provides:-
- “(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.”
24. The ingredients of adverse possession are well settled. As held and expounded in the case of [Tabitha Waittherero Kimani v Joshua Ng'ang'a](#) [2017] eKLR these are;
- a) Open and notorious use of the Property- For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
  - b. Continuous use of the property- The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the



adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection be the true property owner and the date on which he returned.

- c. Exclusive use of the property- the adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- d. Actual possession of the property- the adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

25. Under the provisions of sections 107, 108, 109 and 112 of the Evidence Act, the burden of proof is with the Plaintiff to prove the adverse possession. Because the effect of a finding that adverse possession has been proved is that the registered owner loses his title, the adverse possession must be proved to the required degree. It is a matter of fact which must be proved through evidence.

26. In the present case, the Plaintiff testified that the suit land was given to her by her husband as land to farm. She stated in her witness statement filed on 9<sup>th</sup> August, 2011 whose contents were adopted as her evidence in chief that;

“I stay at Kajulu. I am not employed. I am a widow to one Michael Njera whom I got married to in 1964. My husband built our marital home on land parcel No Kisumu/Wathorego/159 and pointed out to me land parcel No Kisumu/Wathorego/114 which he directed that I be farming. At that time, the land was fallow and was bushy. My late husband cleared the land and I converted it into a farm. Our next-door neighbor was Raphael Omolo Osaka. I gathered from my husband that this land was ancestral land. Ever since I got married, I have been cultivating this parcel of land annually and I am known as the owner by all in the village.”

27. From this testimony, it is clear that the Plaintiff's position was that the land was ancestral land belonging to her husband which her husband had given her to farm and which she continued to own after his demise. Her alleged entry onto the land was therefore as owner or as one with the permission of the owner and not as adverse possessor.

28. The plaintiff's evidence was that it was only recently when she went to conduct such that she discovered that the land was registered in the name of the Defendant whom she did not know. PW3 testified that the said search was done on 18.3.2008.

29. On possession of the land, the Plaintiff testified that she had possession of the suit land, cultivating the same planting maize, potatoes and sorghum since 1964. PW2 testified through her witness statement dated 22<sup>nd</sup> September, 2021 that she is a daughter of the Plaintiff and Michael Njera. That since her childhood to date her mother had been cultivating the suit land planting maize, cassava and potatoes. PW3 testified through her witness statement dated 22<sup>nd</sup> September, 2021 that when she was born, she found her family cultivating the suit land to date. That she knew the land to be her late father's land.



PW.4 relied on his witness statement dated 20<sup>th</sup> May, 2023. He stated that the suit land belongs to the Plaintiff, that she has been cultivating the same since 1965.

30. However, there was no documentary evidence in the form of a surveyor's report or an agricultural officer's report to support the claim. The photographs produced as exhibits did not show any farming activities or cultivation on the land. They show land that was fallow and uncultivated with natural shrubs growing thereon. If indeed the plaintiff had been in active possession and user of the land then there could have been no need for her to pose on the land with a hoe, as she did in the photographs produced as exhibit, for her activities on the land could have been self-evident.
31. The plaintiff's witnesses alleged that there was a temporary house/structure on the suit land as evidence of the plaintiff's possession of the land. However, the evidence regarding the temporary structure was inconsistent and incredible. The Plaintiff did not mention in her Supporting Affidavit and witness statement that either her or her late husband put up a temporary structure or any structures on the land. She testified that her home was far from the suit land. PW2 and PW3 alluded to the presence of a temporary structure on the suit land and that no one ever claimed that they demolish it. On cross examination, PW2 said that the temporary structure was rented by a tenant called Nyakonya. Yet PW3, a sister of PW2 and daughter of the Plaintiff, stated that she did not know the person who occupied the temporary structure and that she did also not know whether the person was a tenant or not. PW4 stated in his witness statement that the applicant had a mabati structure on the suit land in place of a crumbled mud and wattle structure that had been on the land and occupied by some tenants from time to time. The plaintiff never mentioned that she had tenants on the suit land from time to time or that there was a mud and wattle temporary structure that crumbled and was replaced by the mabati structure. The said tenant(s) was not called to testify.
32. On the other hand, the Defendant claimed that the temporary structure on the suit land belongs to him. That he built it to declare his ownership of the land. He testified that the land had always been fallow and that he had been checking it from time to time to confirm the status and has never seen evidence of invasion, cultivation or occupation by the plaintiff or any other person.
33. I find that the status of the suit land as shown in photographs produced by the Plaintiff is as described by the Defendant.
34. In a suit based on adverse possession the plaintiff must prove entry and possession of the suit land. Under section 13 of the *Limitation of Actions Act*, the right of action to recover land only accrues when the land is in possession of some person in whose favour the limitation period can run. As submitted on behalf of the plaintiff adverse possession contemplates 2 concepts; possession and discontinuation of possession. Without prove of these the claim fails.
35. I find that the plaintiff has not proved that she has acquired title to the suit land by adverse possession, and that the title of the registered owner has not been extinguished.
36. Having determined that the Plaintiff has not proved adverse possession, I find no basis to order the Defendant to sign conveyance in favour of the Plaintiff.
37. Regarding costs of the suit, under section 27 of the *Civil Procedure Act*, costs follow the event.
38. I find that the Plaintiff has failed to prove her claim on a balance of probabilities. Her suit is therefore hereby dismissed. Costs to the Defendant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 6<sup>TH</sup> DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**



**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

T. Oduor for the Plaintiff.

K'owinoh for the Defendant.

