



REPUBLIC OF KENYA



KENYA LAW
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**Obiero v Odero & 2 others (Environment & Land Case
E027 of 2022) [2024] KEELC 5245 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5245 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E027 OF 2022**

BN OLAO, J

JULY 16, 2024

BETWEEN

ERICK NAMATSI OBIERO PLAINTIFF

AND

PATRICK ODENDO ODERO 1ST DEFENDANT

VINCENT WAFULA ODERO 2ND DEFENDANT

SILVIA MUSEVE 3RD DEFENDANT

JUDGMENT

1. Erick Namatsi Obiero (the Plaintiff) approached this Court vide his Originating Summon dated 14th November 2022 in which he impleaded Patrick Odendo Odero, Vincent Wafula Odero And Silvia Museve (the 1st, 2nd and 3rd Defendants respectively) seeking a determination of the following questions with respect to the land parcel No Marachi/esikoma/61 (the suit land):
 1. Whether Patrick Odendo Odero, Samson Jumba Keya And Silvia Museve entered into a land purchase agreement in 2007 over a portion of the land parcel No Marachi/esikoma/61 measuring 0.2 hectares.
 2. Whether the Plaintiff, his agents, servants, assignees and kin made entry and have been utilizing the land for agricultural activities for a period of over 12 years.
 3. Whether the use, occupation and utilization has been open, notorious and un-interrupted.
 4. Whether Samson Jumba Keya transferred his right to the Plaintiff.
 5. Whether the 1st and 2nd Defendants have transferred their otherwise non-existed rights to the 3rd Defendant.
 6. Whether the Defendants should bear costs of this suit.



2. Arising from the above, the Plaintiff sought judgment as against the Defendants as follows:
 - a. A declaration that the Plaintiff has acquired proprietorship rights by way of adverse possession of a portion measuring 0.2 hectares to be hived from the land No Marachi/esikoma/61.
 - b. Costs of this suit to the Plaintiff.
3. The Plaintiff filed a supporting affidavit dated 14th November 2020 in support of the Originating Summons. He deposed therein, inter alia, that one Samson Jumba Keya purchased a portion of the suit land in the year 2007 then registered in the name of one Odero Yasuba and took possession thereof by planting crops. That in the year 2020, the Defendant and his step brother the 2nd Defendant took forcefully the suit land (it is not clear which of the three Defendants the Plaintiff is referring to). That the Plaintiff has acquired rights over the suit land by way of adverse possession.
4. Annexed to the Originating Summons are the following documents:
 1. Certified copy of the register for the land parcel No Marachi/esikoma/61.
 2. Copy of land sale agreement dated 28th March 2010 between Erick Namatsi Obiero (as purchaser) and Samson Jumba Keya (as vendor for a portion measuring 0.2 hectares out of the land parcel No Marachi/esikoma/61 at a consideration of Kshs.30,000.
 3. Copy of land sale agreement dated 24th February (no year indicated) between Samson Jumba Keya (as vendor) and Erick Namatsi Obiero (as purchaser) of a portion of land measuring ½ hectare from an un-identified parcel of land.
 4. Certificate of Official Search for the land parcel No Marachi/esikoma/61.
 5. The affidavit of service by one Benjamin Adeya Egesa, a process server of this Court dated February 2023, shows that the 1st Defendant was served with the Originating Summons on 9th December 2022 which he received also on behalf of his brother the 2nd Defendant. He however said he did not know the 3rd Defendant. However on 23rd June 2023 and also 6th October 2023 he was able to serve the 3rd Defendant. None of the Defendants entered an appearance or filed any responses to the Originating Summons.
 6. The suit came up for formal proof on 22nd November 2023 and the Plaintiff was the only within who testified in support of his case. He adopted as his evidence the contents of his supporting affidavit and also produced as his documentary evidence the documents filed herein.
 7. Submissions were thereafter filed by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Plaintiff.
 8. I have considered the Plaintiff's evidence as well as the submissions by his counsel. The Defendant did not file any response to the Originating Summons nor attend Court when served. The Plaintiff's claim is therefore not opposed and neither was the Plaintiff's testimony controverted. That has emboldened counsel for the Plaintiff to make the following submission in the last paragraph thereof as follows:

“ The Respondents having elected not to file response the Court’s hands are filed (sic) to find in favour of the Applicant.”



I think counsel meant to say that the Defendants not having filed any response to the Originating Summons, this Court has no option but to find in favour of the Plaintiff because my hands are tied.

9. The fact that a suit is not defended does not mean that the Court must find the Plaintiff's suit as having been proved. Notwithstanding the fact that a Defendant does not file a defence or testify, the law is that the Plaintiff must prove his claim to the required standard of proof. He who alleges must prove and the provisions of Sections 107, 108 and 109 of the *Evidence Act* are clear on that. I must therefore consider the Plaintiff's un-controverted evidence to find out if he has established his claim to the suit land by way of adverse possession.
10. To begin with a claim in adverse possession is usually against the registered proprietor of the land in dispute or his legal representative. Section 38 (1) of the *Limitation of Actions 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, 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.” Emphasis mine.

The certified copy of the register to the suit land shows that it has since 18th September 1967 been registered in the name of Odero Yasiba (deceased). It is not registered in the names of any of the Defendants. The Defendants have not been sued as the legal representatives of the Estate of the deceased Odero Yasiba and therefore, they have no interest in the suit land against which an order of adverse possession can be made. On that basis alone, the Plaintiff's suit is for dismissal as the Defendants have wrongly been impleaded in these proceedings.

11. Secondly, the Plaintiff's claim is hinged on the sale agreement between the Plaintiff and one Samson Jumba Keya dated 28th March 2010 for a portion of the suit land measuring ½ acre at a consideration of Kshs.30,000 of which a sum of Kshs.20,000 was paid at the time of execution of the agreement. The agreement goes on to add that the “balance of Kshs.10,000 ten thousand shillings only to be paid later.” There is no further agreement showing when the balance of kshs.10,000 was paid, if at all. Instead, there is another agreement executed on 24th February but with no year indicated, between the Plaintiff as the purchaser and SAMSON JUMBA KEYA as the vendor. The land being purchased is not identified except that it is ½ hectare and the purchase price was Kshs.30,000 of which Kshs.7,000 was paid on execution of the agreement. The agreement provides in paragraph three (3) as follows which is relevant to this judgment:

“Therefore have note that I have received Kshs.7,000 seven thousand only and the balance shall be remain Kshs.23,000 twenty three thousand only which shall be paid next month March without fail.”

It is not clear if, at all, this balance of Kshs.23,000 was paid in the following month of March or when exactly the Plaintiff took occupation and possession of the suit land. That was important because the time for purposes of adverse possession would begin to run from the time when the balance of the purchase price was paid – Public Trustee -v- Wanduru 1984 KLR 314.

12. Thirdly, the Plaintiff has deposed in paragraph 7 of his supporting affidavit as follows:



7: “That sometime in 2020, the Respondent and his step brother Vincent Wafula Odero forcefully took possession of the portion subject matter herein”

The agreement between the Plaintiff and Samson Jumba Keya was executed on 25th March 2010 so that must be the year when the Plaintiff took possession of the suit land. In paragraph 3 of the same affidavit, the Plaintiff had deposed as follows:

3: “That one Samson Jumba Keya bought a portion of L.r Marachi/esikoma/61 in the year 2007 registered in the names of Odero Yasuba.”

There is no indication that the Plaintiff also took possession of the suit land in 2007 and therefore, he could only have done so in 2010 when he executed the sale agreement dated 28th March 2010. Therefore, if as deposed by the Plaintiff in paragraph 7 of his supporting affidavit that the Defendant “and his step-brother Vincent Wafula forcefully took possession of the portion subject matter herein”, that can only mean that the Plaintiff had been in possession of the suit land for 10 years before it was forcefully interrupted. That was 2 years short of the statutory 12 years needed to entitle the Plaintiff to orders in adverse possession. In *Mtana Lewa -v- Kahindi Ngala Mwangandi 2005 eKLR*, the doctrine of adverse possession was described as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years.”

And in the case of *Kasuve -v- Mwaani Investments Ltd & Others 2004 I Klr 184*, it was held that:

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition (*Wanja -v- Saikwa No 2 1984 284*)”.

It, as the Plaintiff says, he was forcefully dispossessed of the suit land in 2020, time stopped running then. He has not said when if at all, he went back into possession following that forceful eviction but assuming that he regained possession the same year, then time started running again in 2020 and therefore by the time he filed this suit on 15th November 2022, he had only been in occupation and possession of the suit land for 2 years. That is well below the statutory 12 years required to entitle him to orders that he has acquired the suit land by way of adverse possession.

13. Ultimately therefore and having considered the Plaintiff’s evidence un-controverted as it is, I am not persuaded that he has proved his case to warrant the grant of the orders sought.
14. The up-shot of all the above is that the Plaintiff’s suit is dismissed with no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL TO THE PLAINTIFF ONLY ON THIS 16TH DAY OF JULY 2024.

BOAZ N. OLAO

JUDGE



16TH JULY 2024

And since the Defendants did not enter appearance or file defence, the Deputy Registrar to ensure that this Judgment is served upon them.

Right of Appeal.

