



REPUBLIC OF KENYA



KENYA LAW
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**Pamba & another v Osalo (Environment & Land Case E009 of 2022)
[2024] KEELC 5272 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E009 OF 2022**

BN OLAO, J

JULY 16, 2024

BETWEEN

PROTUS PAMBA 1ST PLAINTIFF

FLORENCE OJIAMBO OUMA 2ND PLAINTIFF

AND

GADI OSALO DEFENDANT

JUDGMENT

1. This is a rather strange suit premised on a claim to the land parcel No Samia/budongo/199 (the suit land) by way of adverse possession. Strange because, as is clear from the Green Card, the suit land is owned in common between Protus Pamba (the 1st Plaintiff) and Gadi Osalo (the Defendant) with each one owning half ($\frac{1}{2}$) share therein. The 1st Plaintiff and the Defendant are therefore joint tenants in common of the suit land with each owning a half ($\frac{1}{2}$) share therein.
2. By an Originating Summons dated 31st January 2022 and filed on 15th March 2022, the 1st Plaintiff and Florence Ojiambo Ouma (the 2nd Plaintiff) suing as Administrators to the Estate of Zakaria Olima Okumu (the deceased) sought a determination of the following questions against the Defendant with regard to the suit land.
 - a. Whether the deceased was in open and notorious possession of the half of LR No Samia/budongo/199 for a continuous un-interrupted period exceeding 12 years.
 - b. Whether the Defendants title to half of LR Samia/budongo/199 became extinguished at the expiry of 12 years from the time the deceased took possession of the portion.
 - c. Whether the Plaintiffs, in their capacity as the Administrators have now acquired title to the half LR No Samia/budongo/199 by virtue of adverse possession.



- d. Whether the registration of the Defendant as the owner of ½ of LR No Samia/budongo/199 should be cancelled and the Plaintiffs be registered as the owners of the said parcel in their capacity as Administrators.
 - e. Costs of the suit.
3. Arising out of the above determinations, the Plaintiffs sought judgment against the Defendant in the following terms:
1. That the Defendant's right over ½ of LR No. Samia/budongo/199 got extinguished by adverse possession upon expiry of 12 years from the date the deceased came into possession.
 2. That the Defendant be perpetually barred from taking or using ½ of LR No Samia/budongo/199.
 3. That the Plaintiffs be registered as the proprietor of ½ of LR No Samia/budongo/199 in their capacity as Administrators.
 4. That the Defendant do execute all the relevant documents to facilitate the transfer of ½ of the suit land into the names of the Plaintiff and in default, the Deputy Registrar do execute the same in place of the Defendant.
 5. That the Defendant do pay costs of this cause.

In support of the Originating Summons, the 1st Plaintiff swore an affidavit dated 31st January 2022 in which he deposed, inter alia, that the Originating Summons is filed by the Plaintiffs as Administrators of the Estate of Zakaria Orima Okumu the deceased herein. That the deceased owned the whole of the suit land measuring approximately 1.0 Hectares having inherited it from his father (the 1st Plaintiff's grandfather) and which they have occupied for over 80 years. The said land is well demarcated on the ground and developed with houses and the Plaintiffs have lived thereon since they were children. In 2008 while conducting a search at the Land Registry Busia, they discovered that the suit was registered in the names of the Defendant and his late father Paul Ogale and so a citation was filed and ½ share of the suit land was transferred into the 1st Plaintiff's name. The Defendant has never been in occupation of the suit land and instead, it is the Plaintiffs' family which has been farming on the same and their grandfather, their two brothers and children are buried thereon. Even their neighbours know that they have occupied the suit land since time immemorial.

4. The Plaintiffs annexed the following documents to the supporting affidavit:
1. Certificate of Confirmation of Grant issued to the Plaintiffs in Busia Cm Succession Cause No 443 of 2018 in respect of the Estate of Zakaria Olima Okumu.
 2. Green Card for the land parcel No SAMia/ Budongo/1999.
 3. 1st Plaintiff's statement dated 31st January 2022.
5. The Defendant did not file any response to the Originating Summons.
6. The hearing commenced on 14th December 2023 when the 1st Plaintiff testified. He relied on his supporting affidavit and witness statement dated 31st January 2022 as his evidence. He also produced the documents listed above.
7. The Defendant informed the Court that he would testify notwithstanding the fact that he had not filed any response to the Originating Summons. Neither the Plaintiffs nor counsel objected and the



Court allowed him to do so. The Plaintiff's counsel has now revisited that issue and made the following submissions:

“We further submit that when the matter came up for hearing, the Defendant who was present in Court was allowed to adduce evidence in defence even though he had not filed a replying affidavit to the Plaintiff's Originating Summons. We submit that in the absence of any pleadings supporting his oral testimony, the same should be ignored by the Court.”

The Defendant is acting in person and as I have already stated above, he filed no replying affidavit. The record shows that when the matter came up for hearing of the defence case on 14th December 2023, I drew the Defendant's attention to the fact that he had not filed a replying affidavit but he said he wished to prosecute his case notwithstanding the absence of his counsel. He insisted that he wanted to proceed. MR Bogonko counsel for the Plaintiffs did not raise any objections. It is true that under the provisions of Order 7 Rule 5 of the [Civil Procedure Rules](#), the Defendant ought to have filed a replying affidavit and other documents in support of his defence. But I see nothing in that provision to show that failure to do so is a fatal omission. In any event, the Plaintiffs did not complain of any prejudice and their counsel was content with him testifying.

8. All he did in his defence was to state that the suit land belongs to his late father. He was then cross-examined by the Plaintiffs' counsel. It is therefore rather late in the day for the Plaintiffs' counsel to take issue with that when he could have raised objections. In any event, as will soon become clear in this judgment, what the Defendant said or did not say will have no significant bearing on this Court's decision in resolving this dispute. The duty is always on the Plaintiff to prove his case to the required standard whether or not the Defendant files any defence or testifies. In [Charter House Bank Ltd v Francis Kamau](#) 2016 eKLR, the Court of Appeal said:

“... judgment cannot be entered for the Plaintiff merely because the Defendant has not testified.”

9. Submissions were thereafter filed by Mr Bogonko instructed by the firm of Bogonko, Otanga & Company Advocates for the Plaintiff and by the Defendant in person.
10. I have considered the evidence by the parties as well as the submissions filed.
11. The Plaintiffs' case is that they are entitled to half (½) share of the suit land by way of adverse possession. They claim that the suit land belonged to their deceased father and that their family has occupied it for over 80 years. That the Defendant has never been in occupation of the suit land and that in 2008 he did a search at the Lands Office and discovered that the suit land had fraudulently been registered in the names of the Defendant and his late father Paul Ogale so he filed a citation and half (½) share was registered in his name. The Green Card shows that the other half (½) share has been registered in the Plaintiff's name since 2021.
12. Section 38 (1) of the [Limitation of Action Act](#) allows a person who is claiming land by way of adverse possession to approach the Court for an order that he be registered as the proprietor thereof. It reads:
38 (1): “Where a person claims 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.”



In *Kasuve v Mwaani Investments Ltd & Others* C.a. Civil Appeal No 35 of 2002 [2004 eKLR], the Court of Appeal had the following to say about a claim to land by way of adverse possession:

“Section 38 (1) of the *Limitation of Action Act* Chapter 22 Laws of Kenya authorises a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. 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 dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa (no 2)* 1984 KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for part of the land and the mere change of ownership of land which is occupied by another under adverse possession does not interrupt such persons’ adverse possession – (see *Githu v Ndeete* 1984 KLR 776).”

It is therefore clear both from the law and precedents that an adverse possession claim is one directed at the registered proprietor of the land in dispute.

13. The first hurdle which the Plaintiffs were required to surmount was to prove that the suit land belongs to the Defendant as the registered proprietor. Although the title deed to the suit land was not produced, the Green Card shows that since 6th July 2021, the suit land has been registered in the joint names of the 1st Plaintiff and the Defendant with each owning half (½) a share thereof. The Green Card does not indicate whether the 1st Plaintiff and Defendant own the suit land as joint tenants or tenants in common. Therefore, under Section 91 (2) of the *Land Registration Act* which was the applicable law when the title was registered in their names, it is presumed that they hold the interest in the suit land as tenants in common in equal shares. Indeed the Green Card shows that each owns half (½) a share. The term tenancy in common is defined in Section 2 of the *Land Act* 2012 as:

“... a form of concurrent ownership of land in which two or more persons possess the land simultaneously where each person holds an individual, undivided interest in the property and each party has the right to alienate or transfer their interest.”

In *Black’s Law Dictionary* 10th Edition, the term is defined as follows:

“A tenancy by two or more persons, in equal or unequal undivided shares each person having an equal right to possess the whole property but no right of survivorship.”

It seems to me that where, as in this case, the 1st Plaintiff and the Defendant are tenants in common with each owning half (½) a share of the suit land, none of them can individually consider themselves as the person “registered as proprietor” of the suit land for purposes of adverse possession as required under Section 38(1) of the *Limitation of Actions Act*. Each one of them is the registered owner of the suit land and in the circumstances, none of them can lay a claim against the other by way of adverse possession. Indeed the law under Section 94 of the *Land Registration Act* provides for how that tenancy can be severed. Section 92 of the same Act provides that each co-tenant shall be entitled to receive a copy of the certificate of lease. Given the above circumstances, I do not see how the 1st Plaintiff can lay a claim to the suit land by way of adverse possession as against the Defendant. Similarly, the 2nd Plaintiff cannot lay a similar claim against the Defendant because the Defendant is not the registered proprietor of the suit land. In my view, only the 2nd Plaintiff can validly claim the suit land by way of adverse possession and that can only be against the 1st Plaintiff and the Defendant who are the registered proprietors therefore.



14. On that ground alone, the Plaintiffs' claim to half ($\frac{1}{2}$) a share of the suit land by way of adverse possession must collapse.
15. Secondly, even assuming that the Plaintiffs can lay a claim to half ($\frac{1}{2}$) a share of the suit land against the Defendant by way of adverse possession, time for purposes of adverse possession would only begin to run from 6th July 2021. This is because, although the Plaintiffs have alleged in paragraph 6 of the 1st Plaintiff's supporting affidavit that the deceased was the owner of the land for over 80 years, the Green Card shows that it was first registered in the name of the Defendant and his father Paul Ogale on 27th March 1980 as the first proprietors. If, as the Plaintiffs claim, they have been living on the suit land for over 80 years when it was the property of their deceased father, their occupation and possession of the suit land cannot be said to have been adverse to that of their deceased father between March 1980 and 6th July 2021 because they must have been there with their father's consent. Time for purposes of adverse possession would therefore only be computed from 6th July 2021. This suit was filed on 15th March 2022 and therefore the statutory 12 years period has not elapsed.
16. Finally, in terms of occupation and possession of the suit land, this Court notes that whereas the Plaintiffs claim to have been in possession and occupation of the suit land including the half $\frac{1}{2}$ share portion of the Defendant, no sufficient evidence has been placed before this Court to prove that allegation. Such evidence would surely include the houses where their father, their grandfather and themselves have been living for those 80 years. In paragraph 7 and 6 of the 1st Plaintiff's supporting affidavit, he has deposed thus:

7: "That the portion is well demarcated on the ground and deceased developed the portion, constructing thereon houses that we have known as home since we were children."

17. And in paragraph 6, he has stated:

6: "That my father owned the whole portion of land registration number Samia/Budongo/199 measuring approximately 1.0 Ha having inherited it from my late grandfather and we have been in occupation of the suit portion for over 80 years."

18. Sections 107, 108 and 109 of the *Evidence Act* provide that:

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(1) "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

108: "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

109: "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Surely the easiest thing for the Plaintiff to do would be to avail photographs of the houses which they have occupied for over 80 years. That burden has not been discharged yet the law places it on the Plaintiffs.



19. In paragraph 12 of the same affidavit, the 1st Plaintiff has deposed thus:

12: “That we also use the portion of land for farming purposes and have planted thereon maize beans and cassava.”

In a claim of land by way of adverse possession, the claimant must prove that he has dispossessed the owner of the land in dispute and that his occupation and possession thereon is adverse to that of the owner. As I have already stated above no photographs were produced to demonstrate that indeed the Plaintiffs and before them, their grandfather and father have built houses on the suit land. If the Plaintiffs’ case is that they have been growing maize, beans and cassava thereon as deposed in paragraph 12 of the 1st Plaintiff’s supporting affidavit cited above, that evidence is also lacking. In the case of *Teresa Wachuka Gachura v Joseph Mwangi Gachira* C.a. Civil Appeal No. 325 of 2003, it was held:

“Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

Similarly, in *Wabala v Okumu* 1997 LLR 608 CAK, the Court of Appeal emphasized the following:

“To be able to acquire title to land registered in another persons’ name, one had to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crop is asserting a claim of ownership to the land. As the lawyers of old used to say, the occupation must be *nec vic nec clam, nec precario*.”

20. Having considered all the evidence herein and notwithstanding the fact that the Defendant did not file any response to the Originating Summons, I am not persuaded that the Plaintiff has surmounted the burden cast on him in proving his claim to half (½) of the suit land by way of adverse possession. His claim is for dismissal.
21. On the issue of costs, the Defendant did not file any response to the Originating Summons. The penalty for that lapse is that this Court must deny him costs.
22. The up-shot of all the above is that the Plaintiff’s suit is dismissed. There shall be no orders as to costs.

BOAZ N. OLAO

JUDGE

16TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL TO COUNSEL FOR THE PLAINTIFF ON THIS 16TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

Defendant present in person.

Right of Appeal.

BOAZ N. OLAO

JUDGE

16TH JULY 2024



Explanatory Notes:

This Judgment was due for delivery on 30th April 2024 but I was not sitting following a bereavement and thereafter I proceeded on my pre-scheduled annual leave. The delay is regretted.

BOAZ N. OLAO

JUDGE

16TH JULY 2024

