



**Abala v Oracha (Enviromental and Land Originating Summons
E005 of 2023) [2024] KEELC 6279 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023
AY KOROSS, J
SEPTEMBER 26, 2024**

BETWEEN

JOHN NOWEL OTIENO ABALA PLAINTIFF

AND

MICHAEL OMONDI ORACHA DEFENDANT

JUDGMENT

Parties' cases

1. This suit was instituted by an originating summons (OS) dated 10/02/2023 in which the plaintiff sought to be deemed an adverse possessor of land parcel no. North Gem/Siriwo/160 (suit property) which measures 1.2 Ha. The suit property is registered in the defendant's name.
2. The OS was supported by the affidavit of the plaintiff which he deposed on 10/02/2023 and to it, were attached several annexures. In rebuttal to the defendant's replying affidavit opposing the OS, he swore a further affidavit on 29/05/2023. Consequently, the plaintiff sought the following reliefs from this court: -
 - a. A declaration that the plaintiff had prescriptive rights over the suit property.
 - b. The court issues an order for the plaintiff to be registered as the proprietor of the suit property.
 - c. There be an order of permanent injunction restraining the defendant, his agents, servants, and or employees from interfering with the plaintiff's peaceful possession and occupation of the suit property.
 - d. Such other orders as the court may deem fit and expedient.
 - e. Costs of the suit be borne by the defendant.



3. The OS was strenuously opposed by the defendant who filed a replying affidavit that he deposed on 12/04/2023 and it had several annexures attached to it.

Plaintiff's case

4. The matter thereafter proceeded for hearing by *viva voce* evidence and the plaintiff testified as PW1 and his evidence was composed of his oral testimony, supporting affidavit, and documents he produced and were marked as Pex.1- 6.
5. It was the plaintiff's case by a written agreement for sale, James Mumyanya Ogoye (James) sold the suit property to him on 2/07/1982 at Kshs 5,500/-. Allegedly, it was witnessed by Benta Ayugi (James's widow) and Gilbert Abala.
6. He stated the purchase price was to be made in installments and on the date of execution of the agreement, he deposited Kshs 1000 and immediately thereafter, entered the suit property, constructed a house upon it, and has lived there to date.
7. He stated the suit property was held in trust for James by Zedekiah Boyi Oremo (Zedekiah) who was the 1st registered owner and the defendant's father.
8. He asserted that he took care of James's widow until her demise in 1998 and during the period before her demise, she had made attempts to trace Zedekiah to no avail.
9. However, on 7/05/1989, he met Zedekiah, and together, on diverse dates of 9/05/1989 and 11/05/1989, they went to the lands office to effect the transfer but unfortunately, the land registrar was absent. As a result, this culminated in Zedekiah executing an affidavit which he deposed on 9/05/1989. He averred the suit property was fraudulently registered in the defendant's name and particularised fraud.
10. On cross-examination, he stated that James was the owner of the suit property and not Zedekiah and that Zedekiah never visited the area from 1989 to 2000. It was his testimony that he made payments of Kshs 790/- to James's widow for purposes of assisting her to bury James. Further, he made full payments towards the purchase price on 5/09/1982 which was witnessed by Mulango and the assistant chief.
11. Further, he stated that initially, his father had been given the suit property before an offer to purchase was made to him by James. On re-examination, he testified his father was not a party to the agreement for sale.

Defendant's case

12. The defendant testified as DW1 and his evidence was composed of his oral testimony, affidavit, and documents which he produced and were marked as Dex.1-4.
13. It was his testimony Zedekiah was the 1st registered owner and produced the adjudication record to prove so and stated there was no evidence James had a registrable interest over the suit property.
14. He stated Zedekiah's alleged signatures as contained in the letter and affidavit that were produced by the plaintiff were inconsistent and doubtful as Zedekiah died on 12/03/1989 and it was not tenable for him to have executed these documents.
15. He asserted the plaintiff's names were suspect as some documents depicted his name as John Nowel Otieno Abala or John Abala Gilbert. He asserted the plaintiff had at one time attempted to subdivide the land through a proxy but his plans failed.



16. On cross-examination, he testified he was born in 1982 and though he was registered as the owner of the suit property 4 years ago, he had not occupied it as the plaintiff tilled it.
17. He stated he did not transfer the suit property to himself fraudulently as he conducted probate proceedings by doing a transfer at the lands office which he did by remitting Zedekiah's death certificate. He was categorical that his father was called John Oracha and not Zedekiah and that a house did not exist on the suit property.

Parties' submissions

18. Upon closing parties' cases, this court directed the plaintiff's counsel and the defendant who was acting in person, to file written submissions, and in compliance, the plaintiff's counsel on record Ms. Wakla & Co. Advocates filed written submissions dated 2/10/2023. Nonetheless, the defendant did not file any.
19. The plaintiff's counsel's submissions identified 3 issues for determination: whether the plaintiff's claim over the suit property had met the threshold of adverse possession, whether the plaintiff was entitled to the reliefs sought and lastly, who should bear the costs of the suit.
20. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsels' arguments on the particular issue and also consider provisions of law they relied upon to advance their respective arguments. As for legal authorities, the plaintiff's counsel did not tender his authorities and, on that basis, the plaintiff's cited authorities shall not be considered.

Issues for determination

21. I have considered the pleadings, evidence adduced, and the plaintiff's written submissions. Being guided by well-cited provisions of law that are highlighted in the plaintiff's submissions, I shall now proceed to consider the merits or otherwise of the plaintiff's case and the issues arising for resolution and shall be dealt with together are: -
 - i. Whether the plaintiff proved his claim of adverse possession to the required standards.
 - ii. What appropriate orders should be granted including an order as to costs?

Analysis and Determination

22. As rightfully submitted by the plaintiff's counsel, the common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act* and it is one of the ways of acquiring land in Kenya. The relevant provisions are underpinned in Sections 7, 13, and 38 of this Act.
23. By the provisions of Section 17 of the *Limitation of Actions Act*, at the expiration of the period of 12 years from the date of entry to land, a person can bring an action to recover land, and the title of the registered proprietor is extinguished.
24. In addition, by Section 38 of the Act, the adverse possessor may apply to this court or any other competent court for it to determine his claim and upon a favourable determination, an order to register him as such takes effect on its registration, subject to any unextinguished rights.
25. The guiding principles of adverse possession were well outlined in the Supreme Court of India decision of *Karnataka Board of Wakf v Government of India & others* (2004) 10 SCC 779) that was cited with



approval in the Court of Appeal decision of Raphael Kabindi Kawala v Mount Elgon Beach Properties Limited [2018] eKLR. The Karnataka Board Case (*supra*) summarized these principles thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

26. When a claimant claims adverse possession, this court has to apply a strict interpretation of the law on adverse possession. Further, the claimant has to meet not one but all the elements of adverse possession. It must be borne in mind and as held in the case of Mweu v Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430, adverse possession is a matter of fact that is observed on the land.
27. It is settled law that claims of adverse possession must be against the registered owner of the suit property and proof of existence of the suit property and its registration must be met.
28. In the instant case, it was undisputed that the plaintiff possessed the suit property and the defendant was the registered owner as evidenced by the produced a green card. However, these undisputed facts are not sufficient as the plaintiff has to discharge proof of all the other ingredients.
29. The plaintiff's counsel submitted the plaintiff has met the ingredients of adverse possession and that his entry was by way of purchase. Thus, this court is called upon to interrogate if the evidentiary burden was discharged.
30. It is settled law that he who alleges must prove and on evidentiary burdens, courts are usually guided by Sections 107-109 of the Evidence Act. In claims of adverse possession which is a civil case, the balance of proof is usually that of balance of probabilities. These provisions of law were elucidated by the Court of Appeal decision of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR where the court stated: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

31. When a claimant claims adverse possession, this court has to apply a strict interpretation of the law on adverse possession. Further, in deciding such a claim, the claimant has to meet not one but all the elements of adverse possession.
32. The plaintiff's claim of adverse possession is anchored on a purchase which is not a new issue and has been litigated in a line of court cases. In such scenarios, it is now settled that even with possession, time can only start running upon full payment of the purchase price. In a more recent decision of



Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, the Court of Appeal explicated the computation of time in agreements for sale in claims of adverse possession as follows: -

“ Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee v Wanduru*, (1984) KLR 314 at 319 Madan, J.A. 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 off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

33. In his exam in chief, the plaintiff testified that the agreement for sale was executed on 2/7/1982 between him and James and witnessed by James’s widow and his brother Gilbert. However, this agreement for sale was never produced to substantiate his assertion.
34. Further, there was no proof whatsoever that the purchase price was ever paid and it is surprising that his brother Gilbert Adala who allegedly witnessed the agreement and payment of the initial deposit of Kshs 1000/= was not even called as a witness.
35. Additionally, neither the assistant chief nor one Mulango who on 5/09/1982 supposedly witnessed the payment of the final balance of 4,500/- were called to testify. He also contradicted himself when he testified that the agreement for sale was tripartite- between him, James, and Zedekiah. It can only be concluded that the agreement for sale was a figment of his imagination. Thus, I am unable to establish when time started to run.
36. In any case, as per the adjudication record and green card that was produced, there is no evidence James had any interests in the suit property. Even if he would ever have executed such an agreement which for emphasis this court finds there was none, such an agreement would have been unlawful.
37. The plaintiff produced a letter ostensibly written on 22/11/1989 by Zedekiah and addressed to the assistant chief. Nevertheless, this letter did not aid the plaintiff’s case as it was written in a language this court could not discern. Further, the plaintiff never bothered to interpret it or produce a certificate of interpretation.
38. He also produced an affidavit allegedly sworn on 9/05/1989 by Zedekiah. However, the defendant refuted the letter and affidavit and asserted it was not plausible for Zedekiah to have signed them as he had died on 12/03/1989. He produced Zedekiah’s death certificate which proved so.
39. Even if the death certificate was obtained in 2016, it was obtained long before the suit was filed, and, in my view, its mere issuance long after Zedekiah had died is not a basis for challenging the document, and its authenticity was never dislodged.
40. This certificate was issued in pursuance of the *Births and Deaths Registration Act* and Section 83 of the *Evidence Act* which necessitates this Court to presume that it is genuine unless rebutted by evidence to the contrary. Accordingly, I conclude Zedekiah did not execute the letter and affidavit.
41. Thus, having reviewed the evidence, I find the plaintiff’s evidence was full of falsehoods, untruthful, and unreliable.
42. Before I conclude, it is noted in claims of adverse possession, the claimant must first concede to the validity of the registered owner’s title. The plaintiff’s attack on the propriety of the defendant’s title did not in any way advance his claim of adverse possession because he could not challenge the validity



of the defendant's title over the suit property while in the same vein lay a stake on it by claiming adverse possession.

43. By contesting the validity of the defendant's title over the suit property, his claim of adverse possession is legally unsustainable and defeated since a claim of adverse possession and fraud cannot co-exist in a single claim. In arriving at this, I adopt the holding of *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank* (2014) eKLR which was cited with approval by the Court of Appeal decision of *Catherine Koriko & 3 others v Evaline Rosa* [2020] eKLR where the court stated: -

“In *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank* (2014) eKLR it was stated:

- (29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.”

44. Ultimately, for the reasons and findings stated above, it is my ultimate finding the plaintiff did not prove his claim to the required standards. It is trite law costs follow the event and in the absence of special circumstances, the plaintiff shall bear the defendant's costs. In the end, I make the following final disposal orders;
- a. The plaintiff's suit against the defendant is hereby dismissed.
 - b. The plaintiff shall bear the defendant's costs of the suit.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

26/9/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the presence of:

Mr. George Otieno for the plaintiff

Defendant present

Court assistant: Ishmael Orwa

