



Owina & 2 others v Mbat (Enviromental and Land Originating Summons E015 of 2022) [2024] KEELC 6275 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6275 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2022
AY KOROSS, J
SEPTEMBER 26, 2024

BETWEEN

FRED CAMILUS OWINGA 1ST PLAINTIFF

LONGINUS ABONG'O ODALO 2ND PLAINTIFF

MAURICE ONYANGO ODALO 3RD PLAINTIFF

AND

SIMON MBATI DEFENDANT

JUDGMENT

1. This suit is instituted by an originating summons (OS) dated 12/09/2022 in which the plaintiffs who are siblings sought to be deemed adverse possessors of land parcel no. South Ugenya/Ruwe/252 (suit property) measuring 2.6 Ha. The suit property is registered in the defendant's name.
2. The OS is buttressed by grounds in support thereof and on the joint affidavits of the plaintiffs deposed on 12/09/2022 together with several annexures in support thereof.
3. Despite service, the defendant did not file any documents to refute the plaintiffs' claim, and therefore, their claim remained undefended. In asserting their claim of adverse possession, they identified the following questions as arising for determination: -
 - a. Whether the plaintiffs have been in open, quiet, and notorious possession of the suit property for a period exceeding 12 years and have acquired title by adverse possession.
 - b. Whether the defendant's entitlement and title to the suit property has become extinguished by adverse possession from the date the defendant was registered as the owner.
 - c. Whether title should be issued to the plaintiffs.
 - d. Who should bear the costs of the suit?



4. The suit proceeded by viva voce evidence and the plaintiffs respectively testified as PW1 – 3 with the 1st plaintiff producing documents that were marked as Pex.1- 4. The witness statements that they adopted were identical.
5. It was their case that they were born on the suit property 50 years ago and had resided therein peacefully and that the defendant was a stranger to them.
6. It was their evidence that during this tenure of occupancy, they had constructed houses thereupon, cultivated it, and grazed their animals upon it. It was their testimony they thought the suit property belonged to their father Odalo Owinga (father) and even their neighbours knew the land belonged to them.
7. They asserted that it was only on 26/04/2022 when they conducted an official search over the suit property that they discovered the suit property did not belong to them and they were unable to establish the circumstances under which their father’s registration status was cancelled.
8. After hearing the plaintiffs and closing the parties’ cases, the plaintiffs’ counsel on record M/s. Odhiambo Odera & Ass. Advocates filed written submissions on 14/05/2024 which this court has considered.
9. However, the defendant did not file any submissions. Having considered the plaintiffs’ pleadings, adduced evidence, and submissions, the issues arising for determination are: -
 - I. Whether the plaintiffs proved their adverse possession claim to the required standards.
 - II. What appropriate orders should be granted including an order as to costs?
10. For the reason that the two issues are interconnected, they shall be dealt with together.
11. 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.
12. The relevant provisions are fortified in Sections 7, 13, and 38 of this Act. From settled case law, notwithstanding a claim of adverse possession is undefended, the onus is on the plaintiffs who claim it to prove the elements thereof.
13. The guiding principles of adverse possession were well outlined in the Supreme Court of India decision of Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779) that was cited with approval in the Court of Appeal decision of Raphael Kahindi 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.”



14. When a claimant claims adverse possession, this court has to apply a strict interpretation of the law. 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 vs. Kiu Ranching & Farming Co-operative Society Ltd.* [1985] KLR 430, adverse possession is a matter of fact that is observed on the land.
15. It is settled law that claims of adverse possession must be against the registered owner of the suit property and the proof of existence of the suit property and its registration are necessary.
16. In the instant case, the 1st plaintiff produced a green card which showed the defendant is the registered owner of the suit property hence the suit is competently before this court. Having fulfilled the first hurdle, the court has to interrogate the other ingredients.
17. 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.
18. In addition, by Section 38 of the Act, the adverse possessors may apply to this court or any other competent court for it to determine their claim and upon a favourable determination, an order to register them as such takes effect on its registration, subject to any unextinguished entry on the register.
19. In the circumstances of this case, the plaintiffs' evidence was uncontroverted and they produced several photographs proving their occupancy which depicted several houses, clotheslines with hanged clothes, mature trees, tilled land, a banana plantation, planted crops, and fences. Thus, I find the plaintiffs are in occupation of the suit property.
20. The plaintiffs' evidence was that their occupation was with some colour of right which was visible, open, and notorious thus giving reasonable notice to the defendant and the public at large that they occupied the suit property. This evidence was uncontroverted hence, the plaintiffs met one of the ingredients of adverse possession as was outlined in the case of *Karnataka Board (Supra)*.
21. The plaintiffs testified that since they were born close to 50 years ago, they had always lived on the suit property. The plaintiffs' ID cards demonstrate they were respectively born in 1949, 1962, and 1961 meaning that at the time of filing suit on 14/09/2022, they were well over 60 years of age.
22. They did not disclose when their parents entered the suit property but from the green card, it is clear their father acquired the suit property during the land adjudication process denoting the suit property was ancestral land.
23. Even though the plaintiffs have feigned ignorance of their father's deregistration as the owner of the suit property, the green card plainly illustrates though their father was registered on 7/10/1970, the suit property was by a court order issued on 25/09/1979 in Kakamega CC No. 297 of 1977, transferred to the 2nd registered owner Crispin Wachira Karimi (Karimi).
24. It appears despite the judgment being in his favour, Karimi did not take possession of the suit property meaning that time for purposes of adverse possession started to run from 25/09/1979 and their claim became ripe as of 25/09/1991 which was 12 years thereafter.
25. Therefore, Karimi held the suit property in trust for them as from that date and the subsequent transfer to the defendant on 9/1/1987 did not interfere with the trust which was an overriding interest over the suit property. This position was upheld in the *Gabriel Mbui v Mukindia Maranya* [1993] eKLR which I hereby adopt.



26. The plaintiffs' evidence that their occupation was non-permissive, continuous, uninterrupted, and unbroken for the necessary statutory period of 12 years was not controverted and there was no evidence that the 2nd and 3rd registered owners ever possessed the suit property. I must therefore find the plaintiffs have met the ingredients of adverse possession.
27. Ultimately, for the reasons stated above, it is my ultimate finding the plaintiffs proved their claim of adverse possession to the required standards. Since they did not disclose with precision their respective sizes of occupancy, the suit property will be registered in their joint names for them to decide how they will divide it.
28. Since it is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiffs which shall be borne by the defendant. In the end, I make the following final disposal orders;
- a. A declaration that the title in the name of Simon Mbatu in respect of South Ugenya/ruwe 252 has been extinguished by Fred Camilus Owingo, Longinus Abon'go Odalo and Maurice Onyango Odalo's adverse possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.
 - b. A declaration that Fred Camilus Owingo, Longinus Abon'go Odalo, and Maurice Onyango Odalo have become entitled by adverse possession to South Ugenya/ruwe 252 which is registered in the name of Simon Mbatu.
 - c. An order that the Land Registrar Ugenya or any other competent land registrar does register Fred Camilus Owingo, Longinus Abon'go Odalo, and Maurice Onyango Odalo as absolute proprietors of land parcel no. South Ugenya/ruwe 252 in place of the Simon Mbatu.
 - d. That the Land Registrar Ugenya be directed that the order herein shall be an instrument of transfer of ownership of the whole of land parcel no. South Ugenya/ruwe 252 from the name of Simon Mbatu to that of Fred Camilus Owingo, Longinus Abon'go Odalo, And Maurice Onyango Odalo as joint tenants.
 - e. Costs of the suit are awarded to the plaintiffs.

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. Odera for plaintiff

N/A for defendant

Court assistant: Ishmael Orwa

