



**Onyango v Odhier (Environmental and Land Originating Summons
E002 of 2023) [2024] KEELC 5937 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

SYLVIAH NYANDIARE ONYANGO PLAINTIFF

AND

GEORGE OMONDI ODHIER DEFENDANT

JUDGMENT

Parties' cases

1. By an originating summons (OS) dated 27/06/2023, the plaintiff filed suit against the defendant who is the registered owner of land parcel No East Alego/Nyandiwa 3185 (suit property).
2. She claimed she had acquired a portion of the suit property measuring 0.09 ha (disputed portion) by adverse possession and sought the following orders from this court: -
 - a. A declaration she had acquired the disputed portion by adverse possession.
 - b. The disputed portion be transferred and registered in her name and in default, the deputy registrar of the court to execute the necessary documents to effect the transfer of the disputed portion in her favour.
 - c. The defendant be restrained from entering, wasting, damaging, and/or in any manner alienating the disputed portion.
 - d. Costs of the suit.
3. The OS was supported by grounds that she had bought the disputed portion from the respondent in 1972 and had been in adverse occupation thereof since then and it was on this basis that she had sought orders from this court. The OS was maintained by the supporting affidavit of the plaintiff deposed on 27/06/2023.



4. In opposition, the defendant filed a replying affidavit deposed on 23/10/2023 and the averments therein largely denied the plaintiff's averments. He contended he had filed a suit in the lower court against the plaintiff to wit Siaya ELC No E040 of 2022 in which he had sought to remove a caution lodged by the plaintiff against the suit property.

Plaintiff's evidence

5. The suit proceeded by viva voce evidence and the plaintiff testified as PW1 and her evidence was led by Dorcas Tabitha Akinyi and Patrick Opiyo Odera who respectively testified as PW2 and PW3.
6. The plaintiff's evidence was composed of her oral testimony, affidavit, witness statement, and documents that she produced and were marked as Pex.1- 3. These documents were respectively composed of a green card of the suit property, a survey report, and photographs.
7. It was her testimony that in 1972, her husband Haggai Onyango Ochieng (Haggai) purchased the disputed portion from John Odhier Okech (John) and immediately took possession by cultivating it. It was her case John died without transferring the disputed portion to Haggai who also died in 2000. She stated upon Haggai's demise, she continued to be in adverse occupation of the disputed portion.
8. On cross-examination, she testified that Pex.2 showed she purchased the disputed portion from Thomas Odhier Oketch (Thomas) but was adamant she purchased the disputed portion from John who was the defendant's father, and stated she had documentary proof of purchase which were in the custody of her counsel.
9. PW2 relied on her witness statement and testified her property was adjacent to the suit property and stated the plaintiff had cultivated the disputed portion without interruption from 1972 to date and that a 3rd party also occupied a portion of the suit property.
10. PW3, a surveyor testified he prepared Pex. 2 and that the plaintiff's family purchased the disputed portion in 1972 which emanated from East Alego/934 (mother parcel), and in carrying out his professional mandate, he established that the plaintiff farmed on the disputed portion and had planted trees thereupon.
11. On cross-examination, he testified that the portion occupied by the plaintiff was pointed out to him by her and he never bothered to scrutinize the green card and he simply utilized the map to prepare the report and the photographs produced in court were of the neighbourhood whose intention was to show the location of the suit property.

Defendant's evidence

12. The defendant testified as DW1 and his evidence was contained in his oral testimony, replying affidavit, and green card of the suit property which was produced as Dex.1.
13. It was his evidence he acquired the suit property from his father Thomas and he was not privy it had been sold. He averred John and the plaintiff were strangers to him and the plaintiff had never occupied the suit property. He stated he only discovered in the year 2018 that the plaintiff had lodged a caution over the suit property.
14. He averred he and his family had been utilizing the suit property and the photographs did not prove occupancy. On cross and re-examination, he testified Thomas died in 2015 and he did not know if the suit property emanated from another parcel of land. He averred he knew he owned the suit property but did not have proof that he conducted probate proceedings before his acquisition rather, the land registrar registered it in his name upon transfer by Thomas.



Parties' submissions

15. Upon closing parties' cases, this court directed counsels to canvas it by written submissions, and in compliance, counsels filed written submissions.
16. The plaintiff's counsel on record Ms. Kowinoh & Company Advocates filed written submissions dated 26/03/2024. The submissions identified two issues for determination: whether the plaintiff had proved her claim of adverse possession and who should bear the costs of the suit.
17. M/s. Ayoo - See & Associates Advocates, counsel for the defendant, filed undated written submissions on 17/04/2024 and identified a singular issue for determination; whether the plaintiff had satisfied the ingredients of adverse possession.
18. 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, only the defendant's counsel tendered his authorities and, on that basis, the plaintiff's cited authorities shall not be considered.

Issues for determination

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

Analysis and Determination

20. The issues which were earlier recognized as arising for determination shall be addressed together.
21. The plaintiff's claim was on the doctrine of adverse possession and the underpinnings of this doctrine are found in Sections 7, 13, and 38 of the *Limitation of Actions Act*. From these provisions of law and settled case law, the onus is on the plaintiff who claims adverse possession to prove the elements of thereof. This was aptly stated in the Court of Appeal case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR wherein it stated the onus of proof lay with the claimant.
22. The principles identified in *Samuel Kihamba (supra)* were well summarized by the Court of Appeal decision of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR in the following terms: -

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”
23. However, in instances of purchase as alleged in the case herein, computation of time usually commences from the date of payment of the full purchase price or payment of the last instalment of the purchase price. This court resounds with the Court of Appeal decision *Public Trustee v Wanduru*



Ndegwa [1984] eKLR where the court explained the relationship between a vendor and purchaser in a claim of adverse possession thus:

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.”

The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees*, [1957] 1 Ch 475; and Simpson J (as he then was) in *Hosea v Njiru Ors*, [1974] EA 526 (K).”

24. When a claimant claims adverse possession, this court has to apply a strict interpretation of the law on adverse possession and also bear in mind that claims of adverse possession are matters of facts that are observed on the land. Further, in deciding such a claim, the claimant has to meet not one but all the elements of adverse possession.
25. It was undisputed the defendant was the registered owner of the suit property. Although the plaintiff's testimony and that of PW2 were unshaken that the plaintiff cultivated the disputed portion, occupancy alone was not sufficient to prove adverse possession. For reasons that in scenarios of adverse possession by purchase, proof of an agreement for sale is pertinent as held in Public Trustee (Supra), this court disagrees with her counsel's arguments that this court should overlook the agreement for sale.
26. Having claimed adverse possession by purchase and alleging she had documentary evidence to prove so, it was expected she would produce an agreement for sale or at least, disclose the purchase price, how it was paid, and even call witnesses who witnessed the said purchase to corroborate her testimony. However, none of this evidence was tendered to the court.
27. Her pleadings, testimony, and documentary evidence were full of contradictions on the circumstances surrounding the purported purchase of the disputed portion. She contradicted herself on who the vendor and purchaser were.
28. On grounds in support of her OS, she contended she purchased the disputed portion from the defendant in the year 1972. Yet it emerged from evidence the defendant had not been born at that time as he was born in 1978.
29. Further, the plaintiff alluded she purchased the suit property from John yet Pex.2 contends she purchased the suit property from Thomas. She testified that John did not have children yet she stated she bought the disputed property from the defendant's father. No doubt, the plaintiff is uncertain who she bought the disputed portion from- whether Thomas, John or the defendant.
30. It appears the plaintiff was on a fishing expedition to justify her entry into the disputed portion and was unsure whether it was Haggai, herself, or both of them.
31. In addition, and as evidenced by the green card, the suit property first came into existence on 25/06/2007 as a subdivision of plot No 2469 and she did not produce documents to prove the nexus of the suit property or for that matter plot No 2469 to the alleged mother parcel. Further, apart from Pex.2 alluding existence of a mother parcel, she did not prove its existence.



32. In the absence of proving that she or Haggai purchased the suit property, I find that I am constrained from computing time for purposes of proving adverse possession. I also find the plaintiff's evidence was contradictory, full of half-truths, and unreliable.
33. Ultimately, for the reasons and findings stated above, it is my ultimate finding the plaintiff did not prove her 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 19TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

19/9/2024

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

In the Presence of:

Mr. Kowinoh for the plaintiff

Miss. Nyagol for the defendant

Court assistant: Ishmael Orwa

