



REPUBLIC OF KENYA



Otieno & another v Otieno (Enviromental and Land Originating Summons E009 of 2023) [2024] KEELC 5916 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

EMILY AGUTU OTIENO 1ST PLAINTIFF

WILLIAM OBIYA 2ND PLAINTIFF

AND

FRANCIS RAGOT OTIENO DEFENDANT

JUDGMENT

1. This suit was instituted by an originating summons (OS) dated 19/04/2023 in which the plaintiffs sought to be deemed adverse possessors of land parcel no. West Alego/Kabura Uhuyi 811 (suit property) which measures 0.32 Ha. The suit property is registered in the defendant's name.
2. The OS was supported by the affidavit of the 1st plaintiff which she deposed on 19/04/2023 and to it were attached annexures. The plaintiffs sought the following reliefs from this court: -
 - a. A declaration the plaintiffs had jointly acquired the suit property by adverse possession.
 - b. The court does direct the land registrar to register the plaintiffs as the joint proprietors of the suit property and a title deed be issued to them.
 - c. 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 29/05/2023 and it had several annexures attached to it. Another replying affidavit that was filed by the defendant sworn on 17/08/2023 was expunged from the court record.



Plaintiffs' case

4. The matter thereafter proceeded for hearing by viva voce evidence and the 1st plaintiff testified as PW1 and her evidence was led by John Oduol Opondo who testified as PW2. The 1st plaintiff's evidence was composed of her oral testimony, supporting affidavit, and documents she produced and were marked as Pex.1- 4.
5. They were respectively a purported agreement for sale, an official search certificate of the suit property, payment thereof, a green card, and a bundle of photographs. As for the PW2, his evidence was composed of his written and oral testimonies.
6. It was the 1st plaintiff's testimony that her husband William Otieno Were (William) purchased the suit property on 17/06/2003 from the previous registered owner Alfred Koko Obwango (Alfred).
7. It was her case immediately thereafter, they took possession thereof and had since then been in continuous and uninterrupted occupation. She stated that Alfred died without transferring the suit property to William. However, she further challenged the defendant's title for allegedly having been acquired without probate proceedings being conducted on Alfred's estate.
8. On cross-examination, she confirmed she did not have written authority from the 2nd plaintiff to swear the affidavit and stated she did not witness the agreement. She averred it was duly executed by William and she did not know when Alfred died.
9. She testified she and the 2nd plaintiff who was her in-law tilled the suit property and, in her case, she started ploughing it in 2020 but clarified that her in-law had ploughed it earlier on.
10. PW2 testified that the 1st plaintiff and William had tilled the suit property from 2007 and that the defendant had never been in occupation of the suit property. On cross-examination, he testified in 2007, he found William and the 1st plaintiff tilling the suit property.

Defendant's case

11. The defendant testified as DW1 and his evidence was led by Charles Okumu and Nicholus Ochieng Koko who respectively testified as DW2 and DW3. The defendant's evidence was composed of his oral testimony, affidavit, and photographs which he produced and marked as Dex.1. DW2 and DW3's evidence was composed of their oral and written testimonies.
12. The defendant testified that he was the registered proprietor of the suit property having purchased it and denied there was any impropriety in his acquisition. He stated he leased an adjacent parcel of land as he kept an eye on the suit property. He stated he was a stranger to the agreement for sale that was produced by the 1st plaintiff.
13. It was his testimony that the suit property which was in his possession had always been vacant as evidenced by photographs he tendered to court and that the plaintiffs were misleading the court when they stated that they had tilled the suit property.
14. Upon being cross-examined, he stated that he purchased the suit property from Alfred but he did not have proof of this except the title deed. He averred that the photographs he had tendered to court demonstrated the land was being ploughed. He testified that due to Luo culture, he could not plough the suit property.
15. DW2 testified that all the parties were his neighbours and the defendant bought the suit property in 2008 and had been tilling it till 2023 when the plaintiffs encroached upon it.



16. On cross-examination, he asserted he was unfamiliar with how the defendant acquired the title. He further testified that he was untruthful in his evidence in chief as the defendant had never tilled the suit property and he lived far off from the plaintiffs.
17. It was DW3's testimony that he was Alfred's son and his mother was called Margaret Abonyo Koko and they were all deceased having respectively died in 2010 and 2020. He averred in the year 2003, he was a minor. He asserted he was unfamiliar with the agreement for sale as the purported signature contained therein was a forgery and Alfred was illiterate and thus could not prepare an agreement for sale.
19. According to him, the defendant bought the suit property for Kshs. 90,000/- and had been in possession. He stated he had never had contact with the plaintiffs. On cross-examination, he testified that though he never witnessed the agreement between Alfred and the defendant, he saw the purchase price being paid. He stated that the defendant acquired the title during his parents' lifetime. He averred that the plaintiffs were his relatives and they first started utilizing the suit property in 2023.

Parties' submissions

20. Upon closing parties' cases, this court directed counsels to canvas it by written submissions, and in compliance, their counsels filed written submissions.
21. The plaintiffs' counsel on record Ms. Muchiri Gatheca & Co. Advocates filed their written submissions dated 20/03/2024 and they identified two issues for determination: whether the plaintiffs had proved their claim of adverse possession and who should bear the costs of the suit.
22. M/s. Ooro Awana & Company Advocates, counsel on record for the defendant, filed their written submissions dated 2/04/2024 and identified two issues for determination; whether the defendant acquired the title documents to the suit property legally and whether the plaintiffs have proved their claim of adverse possession.
23. 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 plaintiffs' counsel tendered their authorities and, on that basis, the defendant's cited authorities shall not be considered.

Issues for determination

24. 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, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim, and the issues for determination are: -
 - I. Whether the 1st plaintiff had the authority of the 2nd plaintiff to institute suit.
 - II. Whether the plaintiffs proved their claim of adverse possession to the required standards.
 - III. What appropriate orders should be granted including an order as to costs?

Analysis and Determination

25. The issues that were earlier recognized as arising for determination shall be addressed herein in a sequential manner however, the last two issues will be handled together: -



I. Whether the 1st plaintiff had the authority of the 2nd plaintiff to institute suit.

26. Although this issue was raised in the defendant's replying affidavit and hearing, this issue was never canvassed in counsels' submissions.
27. The relevant provisions of the law on authority to institute proceedings and swear affidavits on behalf of co-litigants are found in Order 1 Rule 13 (1) and (2) and Order 4 Rule 1(3) of the [Civil Procedure Rules](#) (CPR). For the benefit of the parties, it is necessary to respectively reproduce these provisions of law.

Order 1 Rule 13 (1) and (2) of the [CPR](#) states that: -

- “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

While Order 4 Rule 1(3) of the CPR stipulates: -

“Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”

28. In this case, the 1st plaintiff alleges to have instituted the suit on behalf of the 2nd plaintiff and states she has sworn an affidavit with his authority.
29. However, she did not tender any written authority for her to do either of these on behalf of the 2nd plaintiff and therefore she cannot purport to represent the 2nd plaintiff. Consequently, I find the suit by the 2nd plaintiff incompetent and the only competent suit is that of the 1st plaintiff and I rely on the decision of [Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others](#) [2016] eKLR that was cited with approval in [Lucy Ougo & 3 others v County Government of Nairobi & another](#) [2021] eKLR which stated: -

“However, the court of appeal appears to have settled the foregoing issue when it held in the case of [Research International East Africa Ltd V Julius Arisi & 213 Others](#) [2007] eKLR, C.A at Nairobi Civil Appeal No. 321 Of 2003 that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure...Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII [Civil Procedure Rules](#)...”

II. Whether the plaintiffs proved their claim of adverse possession to the required standards.

30. In their submissions, both counsels thrashed this issue to the pulp with the 1st plaintiff's counsel contending the 1st plaintiff proved her claim to the required standards while the defendant's counsel argued the 1st plaintiff's claim fell far short. On this basis, this court is called upon to interrogate if the



1st plaintiff discharged her evidentiary burden and also bear in mind there is no valid claim by the 2nd plaintiff.

31. 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, and as aptly stated in the Court of Appeal decision of *Samuel Kibamba v Mary Mbaisi* [2015] eKLR, the onus is on the claimant to prove the elements of adverse possession.
32. A comprehensive legal framework of the doctrine of adverse possession is well outlined in the persuasive case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR in the following terms: -
- “(1) the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period...
 - (2) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else...
 - (3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied...
 - (4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people...
 - (5) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the incroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it...
 - (6) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land...
 - (7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period...
 - (8) the rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period...
 - (9) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession...”
33. 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.

34. Claims of adverse possession by purchasers of land who have not acquired title to land as the circumstances of this case have been addressed in numerous court decisions. 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.”

35. A scrutiny of the purported agreement for sale executed on 17/06/2003 shows that in essence, it is an acceptance letter by Alfred to sell the suit property to William. It is uncertain if an agreement for sale was subsequently executed as required by the current Section 3(3) of the *Law of Contract Act* which became operational as of 1/06/2003.

36. In the absence of proving the fruition of the acceptance by a subsequent agreement and full payment of the purchase price, I am not satisfied a claim of adverse possession could be laid based on the acceptance letter.

37. It must be noted the attack on the impropriety of the defendant’s title by the 1st plaintiff did not in any way advance her claim of adverse possession because she 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 adverse possession.

38. In claims of adverse possession, the claimant must first concede to the validity of the registered owner’s title. This was explicated in the case of *Njue v Matiabe & 3 others* (Environment & Land Case E050 & E010 of 2021 (Consolidated)) [2023] KEELC 17361 (KLR) (11 May 2023) (Judgment) in the following manner: -

“...the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.

103. To buttress the position that one cannot implead fraud and adverse possession or better still trust and adverse possession in the same cause of action; it is instructive to take cognizance of the holding of the Court of Appeal in the case of *Catherine Koriko & 3 Others v Evaline Rosa* [2020]eKLR”

39. Since the 1st plaintiff did not plead fraud and illegality. This court must interrogate the ingredients of adverse possession. It is imperative to note that in the absence of an agreement for sale and proof of payment of the purchase price, the date of execution of 17/06/2003 cannot form the basis for the computation of time. See *Peter Mbiri Michuki* (Supra).



40. The 1st plaintiff's purported date of entry was contradictory. In her affidavit, she testified that she took possession on 17/06/2003, and later in cross-examination, it emerged she only started tilling the suit property in 2020. However, this was only 3 years to the time of filing suit. Since a claim of adverse matures after the lapse of 12 years to the time of possession, I find her claim was premature.
41. Though the 1st plaintiff testified that the 2nd plaintiff also tilled it, she did not provide any evidence as to when he purportedly entered the suit property or what activities he carried thereupon. PW2 contradicted this line of evidence and stated that in 2007, he found William and the 1st plaintiff using the suit property which they had so done to date. I find the 1st plaintiff's testimony and that of her witness unreliable and contradictory.
42. Although the 1st plaintiff's counsel questioned the non-use of the suit property by the defendant, this argument could not be used to challenge his title.
43. As was held in the case 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 defendant as the owner of the suit property could deal with it as he deemed fit and his non-use of it could not defeat his title.
44. Ultimately, for the reasons and findings stated above, it is my ultimate finding the 1st 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 1st plaintiff shall bear the defendant's costs. In the end, I make the following final disposal orders;
 - a. The 2nd plaintiff's suit is hereby struck out.
 - b. The 1st plaintiff's suit against the defendant is hereby dismissed.
 - c. The 1st 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:

Miss Nyabuto for plaintiff

Mr. Ooro F. for defendant

Court assistant: Ishmael Orwa

