



**Sewe v Ogutu (Enviromental and Land Originating Summons
E022 of 2022) [2024] KEELC 5938 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E022 OF 2022
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

ERICK OCHIENG SEWE PLAINTIFF

AND

MICHAEL OWINO OGUTU DEFENDANT

JUDGMENT

1. This suit is instituted by an amended originating summons (OS) dated 10/01/2023 in which the plaintiff sought to be deemed an adverse possessor of land parcel no. North Ugenya/Sega/350 (suit property) which measures 2.2 Ha. The suit property is registered in the defendant's name.
2. The OS is buttressed by grounds in support thereof and on the affidavit of the plaintiff that he deposed on 10/01/2023 together with several annexures in support thereof.
3. Despite service, the defendant did not file any documents to refute the plaintiff's claim and therefore, the plaintiff's claim is undefended. It is the plaintiff's case that he had allegedly acquired the suit property by adverse possession and identifies the following issues as arising for resolution: -
 - a. Whether he was the legal owner of the suit property by adverse possession.
 - b. Whether he had met the ingredients of adverse possession including entry to the land without title and with the defendant's knowledge and whether the defendant's title was extinguished after the expiry of 12 years from his entry to the suit property.
 - c. Whether he should be declared the owner of the suit property by adverse possession and the suit property be registered in his name and title issued to him.
 - d. Who should bear the costs of the suit?



4. The suit proceeded by viva voce evidence and the plaintiff testified as PW1 and his evidence was led by Francis George Osoro who is the acting chief of Kagonya Sub- Location and he testified as PW2.
5. The plaintiff's evidence was composed of his affidavit, oral testimony, and documents he produced and marked as Pex.1- 9. It is his testimony his deceased parents lived on the suit property from the 1960s and when he was born in 1982, he continued living there with them and had continued to live therein despite their demise.
6. He averred he and his family had made substantive developments thereupon as evidenced by produced photographs. To further prove occupancy, he asserted his family members had been buried on the suit property and he had death certificates to prove so.
7. He testified that he had met the ingredients of adverse possession to the extent the local administration including PW2 knew him as the owner of the suit property. It was his position time started to run for purposes of adverse possession from 1982.
8. PW2 testified that he authored the letter dated 13/10/2022 because an eviction notice had been issued to the plaintiff. He was categorical the plaintiff was the owner of the suit property as he had lived there for close to 30 years.
9. After hearing the plaintiff and closing the parties' cases, this court directed the plaintiff's counsel on record M/s. C. Obiero & Associates Advocates to file written submissions. The plaintiff's counsel complied by filing written submissions dated 25/03/2024. However, the defendant did not file any submissions.
10. In the plaintiff's submissions, his counsel identified 4 issues for determination which were the issues that were identified in the OS. These issues were earlier highlighted in this judgment and thus, there is no need to reiterate them.
11. To buttress his arguments on the issues, counsel relied on several provisions of law. However, despite relying on several judicial precedents, he did not tender them before this court and on that basis, this court will not consider them.
12. I have considered the plaintiff's pleadings, adduced evidence, submissions, and the well-cited provisions of law, and the issues arising for determination are those identified in the OS and replicated in the submissions. Nonetheless, this court has taken the liberty to summarize them thus: -
 - I. Whether the plaintiff proved his adverse possession claim to the required standards.
 - II. What appropriate orders should be granted including an order as to costs?
13. For the reason that the two issues are interconnected, they shall be dealt with together.
14. 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.
15. The relevant provisions are underpinned 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 plaintiff who claims it to prove the elements thereof.
16. 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 Kahindi Kawala v Mount Elgon Beach Properties Limited [2018] eKLR. The Karnataka Board case (Supra) summarized the 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.”

17. 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 vs. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430, adverse possession is a matter of fact that is observed on the land.
18. 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 tendered.
19. In the instant case, the 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.
20. 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.
21. 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 entry on the register.
22. In the circumstances of this case, the plaintiff's evidence and that of PW2 were uncontroverted. Though the plaintiff produced several death certificates of deceased relatives, they did not substantiate his case as there was no factual evidence showing they were buried on the suit property.
23. Be that as it may, the plaintiff produced several photographs that proved occupancy. A scrutiny of these photographs shows houses exist on the suit property and crops are planted thereupon. Consequently, I am not in doubt the plaintiff is in occupation of the suit property.
24. PW2's testimony corroborated the plaintiff's evidence that his 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 he occupied the suit property. Hence, the plaintiff met some of the ingredients of adverse possession as was outlined in the case of Karnataka Board (Supra).
25. The plaintiff testified that he had always lived on the suit property and when he was born, he found his deceased parents residing thereupon. He disclosed his date of occupancy accrued in 1982. His claim of adverse possession could only be ripe 12 years thereafter, meaning by the end of 1994. This evidence was not controverted and this court is satisfied he entered the suit property in 1982.



26. As of 1994, the suit property was registered in the hands of Felix Mungayo Okuom (Felix) and the suit property changed hands one more time thereafter before lastly resting with the defendant on 16/6/2021. Did such changes interfere with time?
27. My answer to this is in the negative. As of 1994, Felix as the registered owner became a mere trustee of the plaintiff and he was prevented from asserting his title as it had extinguished and all the other subsequent registered proprietors continued holding the suit property in trust for the plaintiff. This position was upheld in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR which I hereby adopt.
28. The plaintiff's evidence that his 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 defendant has ever possessed the suit property from 16/6/2021 which was when it was registered in his name. I must therefore find the plaintiff met the ingredients of adverse possession.
29. Ultimately, for the reasons stated above, it is my ultimate finding the plaintiff proved his claim of adverse possession to the required standards. It is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiff 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 Michael Owino Ogutu in respect of North Ugenya/Sega 350 has been extinguished by Erick Ochieng Sewe's adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*.
 - b. A declaration that Erick Ochieng Sewe has become entitled by adverse possession to North Ugenya/Sega 350 which is registered in the name of Michael Owino Ogutu.
 - c. An order that the Land Registrar Ugenya or any other competent land registrar does register Erick Ochieng Sewe as absolute proprietor of land parcel no. North Ugenya/Sega 350 in place of the Michael Owino Ogutu.
 - 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. North Ugenya/Sega 350 from the name of Michael Owino Ogutu to that of Erick Ochieng Sewe.
 - e. Costs of the suit are awarded to the plaintiff.

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:

N/A for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

