



**Amwayo v Ombuo (Enviromental and Land Originating Summons
E007 of 2022) [2024] KEELC 7272 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2022**

E ASATI, J

OCTOBER 31, 2024

**IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE BY
ADVERSE POSSESSION OF THOSE PARCELS OF LAND
DESCRIBED AS KISUMU KADERO/GOT NYABONDO/2033**

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP. 22 LAWS OF KENYA

BETWEEN

NOAH ONYANGO AMWAYO PLAINTIFF

AND

MARY AOKO OMBUO RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 22nd March, 2022 stated to be brought pursuant to the provisions of section 58(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules 2010, Noah Onyango Amwayo, the Plaintiff who claims to have acquired title through adverse possession of all that parcel of land known as Kisumu Kadero/Got Nyabondo/2033 (herein, the suit land) sought the following orders against the Defendant, Mary Aoko Ombuo, -
 - a. That the Plaintiff has acquired title to 0.27 hectares comprised in L.R. No. Kisumu Kadero/ Got Nyabondo/2033.
 - b. An order directing rectification of the register by deleting the names of Simon Mboga Abira and substituting the name of Noah Onyango Omwayo as proprietor of the parcel of land described as Kisumu Kadero/Got Nyabondo/2033 measuring approximately 0.20 hectares and the Plaintiff/Applicant be issued with the title deed in respect of the said parcel



- c. An order vesting title of all that parcel of land described as Kisumu Kadero/Got Nyabondo/2033 measuring approximately 0.20 hectares in the name of Noah Onyango Omwayo as absolute proprietor and all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.
 - d. Costs of the suit.
2. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by Noah Onyango Amwayo on 22nd March, 2022.
 3. The Plaintiff's case is that he has been in constant exclusive occupation, use and possession of the suit land since the year 1989 without any interruptions which is a period of over 12 years and he therefore has acquired title to the suit land by adverse possession by operation of law.
 4. That the Plaintiff had bought the land from the father of the Defendant in 1987 and established his home thereon in 1989. That the Defendant who has been sued in his capacity as the legal representative of the estate of his late father, one SIMON MBOGA ABIRA, deceased, holds the title in trust for the Plaintiff.
 5. The Defendant's response to the Originating Summons was vide the Replying Affidavit sworn by the Defendant on 14th March, 2023. She contended that she is the daughter of SIMON MBOGA ABIRA, deceased, who is the legitimate proprietor of the suit land. She denied knowledge of any transactions between the Plaintiff and her late father. She also denied that the Plaintiff has possession of the suit land. That the estate of her late father who died on April, 15, 1990 has not been distributed since no succession cause has been filed.

The Evidence

10. The Originating Summons was heard by way of viva voce evidence. The Plaintiff testified as PW1 and adopted the contents of the Supporting Affidavit and the Supplementary Affidavit as his evidence in chief. He produced transfer of land form, certificate of official search dated 25th February, 2022, a bundle of 6 photographs, Letter dated 29th August, 2023 from Siganga & Company Advocates and Certificate of confirmation of Grant in Succession Cause No.215 of 2017. He testified that he constructed his house in the year 1989.
11. On cross-examination he stated that he had bought the whole of the suit land. That he bought the land before survey.
12. The Defendant testified as DW1. She adopted the contents of her Replying Affidavit as her evidence in chief.
13. On cross-examination, she stated that she did not know when the Plaintiff entered the land but that he had been on the land for about 20 years. That she did succession in respect of only one property of the deceased.

Submissions

14. At the close of the evidence, parties filed submissions on the case.
15. On whether the Applicant had met the threshold for the grant of the orders sought, it was submitted on behalf of the Plaintiff that he had been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. Counsel relied on the provisions of Section 7, 13



and 38 of the *Limitation of Actions Act*. Counsel also relied on, among others, the case of Wambugu - vs- Njuguna [1983]KLR 172 where it was held that;

In order to acquire by statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

16. Dispossession of the proprietor that defeats his title are acts of which are inconsistent with his enjoyment of the soil for the purposes of which he intended to use it.

And that;

“The proper way of assessing proof of adverse possession, would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”.

17. Counsel submitted that for the claim of adverse possession to suffice, the claimant must demonstrate that the possession was non-permissive and non-consensual and without license.
18. That in case of purchase, time begins to run from the date of final payment of the purchase price.
19. Counsel relied on the case of Hosea -vs- Njiru & Others (1974)E.A. 526 where it was held;

“Once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that be thenceforth, by occupation for twelve years was entitled to become registered as proprietor of it”.

20. That in the present case, it was evident that the Plaintiff had paid the entire of the purchase price prior to executing the sale agreement.
21. That the Defendant did not lead any evidence to the contrary and did not rebut the same. Counsel submitted further that the Plaintiff’s possession of the suit land became adverse to the Respondent in the year 1989 when the Plaintiff established a homestead on the suit parcel and that time for adverse possession will be computed from that date until the date of lodging of the suit which is 33 years.
22. Relying on the case of Githu -vs- Ndete (1984)KLR 776, Counsel submitted that the Plaintiff’s act of building his homestead on the suit land is sufficient proof of his possession. Counsel urged the court to find that the Plaintiff has had open, quiet and uninterrupted possession of the suit land in line with the principles of adverse possession. Counsel urged the court to award costs to the plaintiff.
23. On behalf of the Defendant, written submissions were filed by the firm of Siganga & Co. Advocates. Counsel framed the substantive issue for determination to be whether the Plaintiff had met the threshold for the grant of orders of adverse possession.
24. Counsel submitted that the question of whether legitimate title holder has been dispossessed or lost their title is to be handled with utmost diligence and care. That it is trite that no citizen should be deprived of their constitutional right to own property arbitrarily hence due consideration, care and diligence ought to be exercised whenever questions concerning dispossession of land arise. Counsel relied on the case of David Munene Wamwani & Others -vs- The Registered Trustee of the Anglican Church of Kenya & Another (Nyeri Civil Appeal No.36 of 2015 (unreported) to support the submissions.



25. Counsel submitted that the Plaintiff's occupation of the suit land was intermittent and not continuous. That the testimony of DW1 revealed dispute between the Plaintiff and the Defendant concerning the land parcel before the Chief, a fact that was confirmed by the Plaintiff. That the Plaintiff acknowledged his lack of title and promised to vacate. That continued possession after agreeing to leave could only connote a license.
26. That the Plaintiff did not enter the land as an adverse possessor but as a buyer-seller transaction which implies permission from the Defendant. Counsel relied on the case of *Samuel Miki Waweru -vs- Jane Njeri Richu, Court of Appeal No.122 of 2001* (unreported) where it was stated that;

“it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise”.
27. Counsel also relied on *Kasuve -vs- Mwaani Investments Limited & Others* [KLR 184] and *Mate Gitabi -vs- Jane Kabubu Muga & Others* (Nyeri Civil Appeal No.43 of 2015) (unreported).
28. Counsel submitted that the Plaintiff had failed to satisfy the requirements of adverse possession and prayed that the claim be dismissed and costs be awarded to the Defendant.

Issues for Determination

29. Having read the pleadings filed by the parties, listened to the evidence adduced and taking into account the submissions filed by Counsel for the parties, I find the sole issue for determination to be whether or not the Plaintiff has acquired title to the suit land by adverse possession.

Analysis and Determination

30. The suit herein is based on the doctrine of adverse possession. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 prohibits the filing of an action to recover land after the end of twelve years from the date on which the right of action accrued to the claimant or if that right first accrued to some person through whom he claims, to that person.

Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.



The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the [Limitation of Actions Act](#) and Order 37 of the Civil Procedure Rules, 2010

Order 37 Civil Procedure Rules provides

- “(1) An Application under Section 38 of the [Limitation of Actions Act](#) shall be made by Originating Summons
- (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

31. Under section 7 of the [Land Act](#) adverse possession is listed as one of the methods of acquisition of title to land in Kenya.
32. In *Wangari Waithanjie & 2 Others -vs- Thathi Francis Murnariwa* [2017]eKLR the court held that in a claim of adverse possession, the law is that the Plaintiff must prove that:-
- 33.
- i. he has been in continuous and un-interrupted occupation and possession of the land in dispute for 12 years or more having dispossessed the original owner thereof.
 - ii. That such possession has been open, notorious and with knowledge of the registered owner.
 - iii. That the possession is without the permission of the owner.
 - iv. That the Plaintiff has asserted a hostile title to the registered owner of the property.
34. Similarly in *Gabriel Mbui vs Mukinda Maranya* (19193)eKLR the court itemized the elements of adverse possession as: -
- a. The intruder claiming right by adverse possession must make physical entry and must be in actual possession or occupancy of the land for the statutory period,
 - b. 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 against everyone else,
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, that is, without permission from the true owner of the land occupied.
 - d. The non-permissive adverse possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi,
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of his predecessors in title and to vest it in the encroacher or squatter unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for purposes for which he intended to use it,
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open, notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land and
 - g. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period.



35. In the present case, the Plaintiff's evidence is that he entered the suit land in the year 1989 after purchasing the suit land from Simon Mboga Abira, the father of the Defendant. But that although the seller executed transfer forms, he died before he could transfer the land to him. It was the evidence of the Defendant that Simon Mboga Abira died on 15th April, 1990.
36. Though entry of the Plaintiff onto the suit land was on the basis of a land sale agreement, time begun to run in favour of the Plaintiff and against the deceased's title from the date of the last payment of the purchase price.
37. In *Catthy Alucia Jebor Kiplagat vs Vincent Komen Krelnut* [2018 eKLR the court held that Adverse possession can be claimed where registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.
38. Also in *Peter Mbiri Michuki vs Samuel Mugo Michuki* [2014] eKLR relied on in *Public Trustee vs Wanduru*, 1984 KLR 314 the Court stated that

“adverse 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 of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

39. A land sale agreement was produced as exhibit. It was also the Plaintiff's case that he had had continuous, exclusive, open and notorious occupation of the suit land. The Plaintiff testified that he established his home on the suit land. Photographs produced as exhibits showed the home.
40. The Defendant admitted that the Plaintiff has his home on the suit land. She stated on cross-examination;

“I did not know when Noah entered the land. He had no permission. He has been on the land for about 20 years”.

When shown the photographs, she responded;

“I see the photographs shown in exhibits P.4. They are photos of Noah's home. That home has been in existence for a long time.”

41. Though it was submitted on behalf of the Defendant that the Plaintiff's occupation of the suit land was not continuous but intermittent, there was no evidence by the Defendant that the occupation was intermittent. It was submitted on behalf of the Respondent that there was a dispute handled by the chief in which the applicant undertook to vacate the land. This was however not part of the Respondents averments in the Replying Affidavit. No minutes or any documentary evidence was produced to prove that the applicant undertook to vacate. In court when asked concerning summons by the Chief, the Defendant stated;

“The Chief called me and told me that Noah wanted me to give him land.”



42. On re-examination, she stated that it was Noah who reported her to the Chief. There is totally no evidence that either the deceased or the Defendant as the personal representative took any step to assert their title to the suit property. The Defendant confirmed this when she stated on cross-examination

“I have never filed any dispute against Noah. I have never had any disagreement with Noah.
The stay has been peaceful.

43. In the case of *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura; civil Appeal no.20 of 1993* quoted in *Presbyterian Church of East Africa (Uthiru Church) & another vs Kihoro & 3 Others (Civil Appeal 303 of 2018*[2022]KECA 49 (KLR) (Civ) (4 February 2022) Judgement, the court of appeal held that

“time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land...”

44. I find no evidence in the present case that either the Respondent and/or the deceased asserted their right or the applicant admitted the deceased’s or Respondent’s right over the suit land.

45. It was the Plaintiff’s case that he had sued the Defendant herein in her capacity as the legal representative of Simon Mboga Abira vide Succession Cause No.215 of 2017. Though the Defendant denied this position at first and claimed that no succession had been undertaken to the estate of her late father, when she was shown copy of Certificate of Confirmation of Grant in Kisumu Succession No.215 of 2017 Estate of Simon Mboga Abira, attached to the Supplementary Affidavit dated 26th March, 2018, she stated;

I only did succession in respect of parcel No.2089 only.

46. By that time, I was doing succession, I knew that the suit land was in my father’s name. I did not have sufficient funds to include the suit land in the succession.”

47. This confirmed that the Defendant is the personal representative of the deceased. It is trite that death of a registered owner does not stop time from running in favour of the adverse possessor.

48. Under section 17 of the *Limitation of Actions Act*, the title of the registered owner is extinguished at the expiry of the limitation period.

49. Further under section 28 of the *Land Registration Act*, a right acquired under adverse possession becomes an overriding interest to which registered land is subject.

50. On the basis of the foregoing analysis of the evidence, I find that the Plaintiff has had adverse possession of the suit land.

51. That the Plaintiff has proved his case against the Defendant on a balance of probabilities. Judgement is therefore hereby entered in favor of the plaintiff on the Originating Summons for: -

- a. A declaration that the Plaintiff has acquired title to the whole of land parcel known as Kisumu Kadero/Got Nyabondo/2033 by adverse possession.
- b. A declaration that the title of the deceased, Simon Mboga Abira, to the suit land parcel No. Kisumu Kadero/ Got Nyabondo/2033 is extinguished by effluxion of time.



- c. An order for transfer of parcel of land known as Kisumu Kadero/Got Nyabondo/2033 by the Defendant, as the personal representative of the deceased, in favour of the Plaintiff failing which the Deputy Registrar of the court to execute the requisite forms and documents so as to effect the transfer.
- d. Costs of the suit to the Plaintiff.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Raburu for the Plaintiff.

Ouma for the Defendant.

