



**Ouma v Odhiambo (Environmental and Land Originating Summons  
E007 of 2023) [2024] KEELC 7204 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023  
MN MWANYALE, J  
OCTOBER 31, 2024**

**BETWEEN**

**MARY AKOTH OUMA ..... PLAINTIFF**

**AND**

**REGINA ODHIAMBO ..... DEFENDANT**

**JUDGMENT**

1. The Applicant Mary Akoth Ouma took out an Originating Summons under Section 38 of the Limitations of Actions Act, Cap 22, and Order 37 Rule 7 of the Civil Procedure Rules against Regina Adhiambo for determination of the following questions
  - a. Is Regina Adhiambo the registered proprietor of Land parcel Nandi/Kapkerer/971?
  - b. Has the Applicant been in actual factual, active and physical possession and occupation of Land parcel No. Nandi/Kapkerer/971?
  - c. Has the said occupation and possession been peaceful, uninterrupted and has the same been known to by the Respondent and the previous registered owners?
  - d. What is the cumulative duration of such occupation to date?
  - e. Was the entry or ingress of the Applicant without permission, let and or at all the instance of the citer and/or a previous registered owner?
  - f. Has the Applicant fulfilled all and singular the requirements for the declaration for the extinction of the registered proprietor's interest in the said parcel of land and the registration of the same in their favour by virtue of the doctrine of Adverse Possession?



- g. Should a declaration be made that the ownership and proprietary rights of the registered owner Regina Adhiambo be and is hereby extinguished as she holds the suit land in trust for the Applicant?
  - h. Should an Order be issued to the register Nandi Land Registry for Registration of the Applicant as the proprietor of land parcel No. Nandi/Kapkerer/971.
2. The Originating Summons and the Supporting Affidavit were served upon the Respondent who did not enter appearance and did not also file a Replying Affidavit, necessitating a request for Judgment to be made. The Honourable Deputy Registrar endorsed the said request for judgment on 8/2/2024 and this Court allowed the matter to proceed as undefended and directions under Order 37 were issued where the Originating Summons was converted as a plaint and the Supporting Affidavit as a witness statement; and the matter to proceed by way of viva voce evidence as undefended.
  3. Upon taking of the directions of conversion of the Originating Summons to a plaint the Applicant shall now be referred to as the Plaintiff and the Respondent as the Defendant.
  4. Upon determination of the questions the Plaintiff sought the following prayers; -
    - a. Declaration that the Plaintiff acquired the right to Land Parcel No. Nandi/Kapkerer/971
    - b. There be an order directing the Land Registrar Nandi Land Registry to enter names of the Plaintiff in the parcel register subject to adverse possession as the sole and absolute proprietor and forthwith issue a title deed to the Plaintiff
    - c. Costs of the Originating Summons be determined.

**Plaintiff's Case: -**

5. It is the Plaintiff case that the suit property currently in the name of Regina Adhiambo but she and her family entered thereon in or about 1998, and they have been tilling the said land, and that entry was without consent, permission or let by the registered owners and/or proprietors, and has been in actual physical and outright possession and occupation peaceful and uninterrupted for 25 years.
6. On the strength of the above, the Plaintiff sought for the orders prayed and set out at paragraph 4 of this judgment.

**Plaintiff's Evidence: -**

7. The Plaintiff Mary Akoth Ouma holder of National Identity Card Number 10034674 testified as PW1. She stated that she had lived on the property for 25 years, and that the late husband had bought the property from Regina Achieng Adhiambo in 1990.
8. She testified and produced a copy of photographs showing sugarcane as P Exhibit 1, a certificate of official search as P Exhibit 2, and a copy of the Register (Green Card P Exhibit 3).
9. After her testimony her Advocate sought and was granted leave to file a supplementary affidavit, and further two witness statements which he did.
10. PW2, John Omolo Ondiek, holder of National Identity Card No. 2780120 equally testified and adopted his witness statement dated 22/5/2024. It was his testimony that Mary Akoth Ouma had been known to her since 1998 and that he also knew her late husband. That she had planted, cultivated sugarcane, cassava and maize from 1998. It was his testimony that she had initially leased the property but thereafter bought the same in 2013 and that he was a witness to the Agreement for



Sale dated 9/12/2013 between Daniel Kimayo and Sylvance Ouma Nyawiri, and another agreement dated 9/12/2013 between Regina Achieng and Daniel Kimaiyo and that agreement dated 11/7/2013 between Daniel Kimaiyo and Sylvance Ouma. He produced the agreements dated 9/12/2013 both sets as P Exhibit 4 and 5 and the agreement dated 11/1//2015 as P Exhibit 6.

11. He testified that Regina had purchased the property but was refunded and Daniel Kimaiyo the Original owner then sold to Sylvance Ouma.
12. Mr. Godfrey Kpkemboi Biama, the Senior Chief of Kapkerer Location testified as PW3 and adopted his witness statement dated 23/5/2024. It was his further testimony that the suit property Nandi/Kapkerer/971 was located in his jurisdiction, and he knew the exact location of the property. He stated that the property had been occupied by the family of Mary Akoth Ouma who farmed thereon and they since he become a chief in 2004, he had received no complaint with regard to their occupation.
13. After the testimony of the 3 witnesses the Plaintiff case was closed and similarly as the Defendant neither entered appearance nor filed defence, and did not call any witnesses nor participated in the proceedings, the Court closed the defence case. The Plaintiff was allowed to submit orally on the matter.

**Plaintiff's Submission: -**

14. In her brief submission, Ms. Abuya Learned Counsel for the Plaintiff, submitted that the Plaintiff had met the legal threshold as per Section 7 of the Limitation of Action Act, and had proven the elements of adverse possession; in that the Plaintiff had proven nonconsensual non-permissive open and notorious uninterpreted stay of more than 12 years, which position was corroborated by other witnesses such as PW2 and PW3.
15. She placed reliance in the decision in the case of Mtana Lewa vs Kahind Ngala Mwangandi 2015 eKLR.
16. It was further submitted that the Agreement for Sale show that Regina Odhiambo the Defendant had purchased from Mr. David Kimaiyo and she later resold the same parcel to Mr. Kimaiyo who later resold to Mr. Ouma the deceased husband of the Plaintiff. Thus, the Agreement for Sale exhibited as P Exhibit 4 and 5 were an attempt to formalize ownership so as to avoid a dispute.
17. The Plaintiff's Counsel thus urged the Court to allow the Plaintiff's suit.

**Defendants Submission: -**

18. The defence did not file submissions as they did not take part in the proceedings.

**Issues For Determination: -**

19. Having analyzed the pleading the evidence and the submissions, the Courts frames four issues for determination to wit;
  - i. Whether the Plaintiffs claim for adverse possession in Nandi/Kapkerer/971 has crystallized,
  - ii. Whether or not the Plaintiff has proven adverse possession; and
  - iii. Whether she is entitled to the reliefs sought in the Plaintiff (OS)
  - iv. Who bears the costs of the suit?



### **Analysis And Determination: -**

20. As noted in the judgment this matter was undefended, however in line with the decision of the Court of Appeal in the case of Karugi and others vs Kabiya & 3 others (1983) eKLR where the Court held as interalia; -

“The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of proof is not way lessened because this is heard by way of formal proof.”

21. In her Originating Summons and evidence before Court, the Plaintiff pleaded that she took possession and occupation of the suit land in 1998; and thereafter in about 2013, her late husband entered into an agreement for sale with David Kimaiyo the first registered owner to buy the parcel so as to regularize their occupation.

22. It was her case the Regina Odhiambo had purchased from David Kimaiyo but later on sold her interests to the said David Kimaiyo who sold the parcel to the Plaintiff late husband in 2013, towards this end a total of 3 exhibits were produced to wit, P Exhibit 4, 5 and 6.

23. Thus, when then did the Plaintiff occupy the suit land? PW1 and PW2 put the occupation in 1998 and PW3 stated that upon his ascension to the office of the Chief, he had found the Plaintiff in occupation of Parcel No. Nandi/Kapkerer/971. It must thus be deemed that the occupation by the Plaintiff was before PW3 appointment as the area chief of Kapkerer Location in 2004, and the Court deems the testimony of PW1 and PW2 as to give the probable occupation in 1998.

24. It therefore follows that the Plaintiff and her family occupied from 1998 and 12 years for purposes of adverse possession crystalized around 2010. The Court shall look at the nature of the Plaintiff's occupation from 1998 till 2010, when the right to adverse possession accrued. In this period the Plaintiff and PW2 indicate that the occupation was non – consensual and non-permissive.

25. The Plaintiff's testimony was corroborated by PW3 who indicated that from 2004 the Plaintiff had occupied the suit property peacefully and that there was no complaint registered in his office.

26. The evidence of the 3 witnesses were un-controverted, there being no Replying Affidavit and the Court deems the same as factual. The Copy of the green card P Exhibit 3 indicated that Parcel No. Nandi/Kapkerer/971 was registered on 11/1//2021 and title issued on the said date. The property is said to have been a subdivision of No. Nandi/Kapkerer/687.

27. It is possible that the Plaintiff may been in occupation of a portion of title No. Nandi/Kapkerer/687 before the subdivision however no evidence towards this end was adduced in Court, and this was equally not pleaded.

28. Since the Register of Parcel No. Nandi/Kapkerer/971 was opened on 11/11/2021, and the suit was filed in 2023, the 12-year period had not run for purposes of adverse possession as was held in Francis Gitonga Macharia vs Muiruri Waithaka Civil Appeal No. 110/1997.

29. The result would have been different had the Plaintiff pleaded adverse possession in Parcel No. Nandi/Kapkerer/687 the original mother title and its subsequent subdivision in Parcel No. Nandi/Kapkerer/971 and also exhibited before Court the copy of register for Parcel No. Nandi/Kapkerer/687. By doing so the Court would have been aware when the register of Parcel No. Nandi/Kapkerer/687 was opened and weighed it against the occupation of the Plaintiff and her family from 1998 as was pleaded. The Court was denied this chance and as parties are bound by their pleadings,



the Court finds that the register of Parcel No. Nandi/Kapkerer/971 having being opened in 2021, a claim of adverse possession filed in 2023 is definitely premature and the claim in adverse possession has not crystallized.

30. Having answered the first issue in the negative, the Court shall not look into the other issues for determination.
31. The result is that the Plaintiff has failed to prove her case on a balance of probabilities, as required vide Section 107, 108 and 109 of the *Evidence Act* and accordingly the Plaintiff's suit is hereby dismissed with no orders as to costs.

**JUDGMENT DELIVERED AND DATED AT KAPSABET THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**

In the presence of; -

Ms. Abuya holding brief for Mr. Obiero for the Plaintiff

