



REPUBLIC OF KENYA



**Oriaro v Otieno & another (Enviromental and Land Originating Summons  
1 of 2021) [2024] KEELC 7582 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7582 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2021  
AY KOROSS, J  
OCTOBER 31, 2024**

**BETWEEN**

**GEORGE ABIERO ORIARO ..... PLAINTIFF**

**AND**

**GODFREY ONYANGO OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM ODUOR OKELLO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. At the heart of contention is land parcel no. Siaya/ombambo/2135 (suit property) registered in the 2<sup>nd</sup> defendant's name. The 2<sup>nd</sup> defendant allegedly purchased the suit property from the 1<sup>st</sup> defendant who was a previous registered owner.

**Plaintiff's case and evidence**

2. By an originating summons (OS) dated 26/02/2021, the plaintiff instituted the suit against the defendants contending he had acquired the suit property by adverse possession. Consequently, he sought the following reliefs from this court: -
  - a. The defendants' names be deleted from the register and in its place, the plaintiff's name be inserted as the owner and proprietor of the suit property.
  - b. The District land registrar be ordered to alter the suit property's register to reflect the plaintiff as the registered owner.
  - c. The defendants bear the costs of the suit.



3. The OS was premised on the grounds on its face and on the affidavit in support thereof which was deposed by the plaintiff on 26/02/2021.
4. The plaintiff testified as a sole witness. It was his testimony the suit property was a subdivision of land parcel known as Siaya/Obambo 136 (136). According to him, this 136 subsisted at the time of adjudication, and on registration on 13/01/1976, it was registered in the name of John Oriaro Ukumu (John) who was his father.
5. He stated before this registration, John had earlier on 20/08/1971, built his homestead on the suit property which house was still in existence as evidenced by the sketch map that he produced.
6. However, in August 2006, he moved from John's homestead and built on the suit property and had lived there openly and without the 2<sup>nd</sup> defendant's consent. He asserted that he was not aware of any previous proceedings between the parties.

### **Defendants' cases and evidence**

7. In opposition, the defendants filed a joint statement of defence dated 10/5/2023 in which they denied averments contained in the OS, its grounds, and supporting affidavit.
8. The defence admitted the 2<sup>nd</sup> defendant was the registered owner of the suit property having purchased it from the 1<sup>st</sup> defendant by an agreement for sale. They also admitted the suit property was derived from 136 and the 1<sup>st</sup> registered owner of the suit property was Michael Onyango Adit (Michael) who was the 1<sup>st</sup> defendant's father.
9. In their defence, they stated that the plaintiff's occupancy had been marred with civil and criminal cases hence his occupancy has always been tainted with interruption, chaos and hostility.
10. They urged the court to dismiss the plaintiff's suit with costs and sought an order for eviction of the plaintiff from the suit property.
11. The 2<sup>nd</sup> defendant testified as DW1 and the 1<sup>st</sup> defendant as DW3. Their evidence was also led by James Onyango Obondi who testified as DW2.
12. Their evidence was composed of their witness statements, oral evidence, and documents that were produced by the 2<sup>nd</sup> defendant. These documents were admitted as evidence and marked as Dex. 1- 6.
13. The 1<sup>st</sup> defendant reiterated the averments contained in his defence and testified he purchased the suit property on 4/02/2012. Nonetheless, the title crystallized much later- the transfer to the suit property was transferred to his name on 4/12/2018 and the title was issued to him on 10/01/2019.
14. It was his testimony when he brought a surveyor to the suit property on purchase, he received resistance from the plaintiff's family and that he found homesteads therein but did not recall how many they were and did not know when they were constructed.
15. He testified that upon purchase, he used the suit property with the 1<sup>st</sup> defendant but stopped using it in 2018 and that the plaintiff's homestead stood therein but he never knew it was in the suit property.
16. DW2 testified and stated that there had been protracted disputes over the suit property between his father Buong Opondo (Buong) and Asadho Oriaro (Asadho) who was the plaintiff's grandfather. It was his case that Buong was successful in those disputes.



17. He was categorical that the plaintiff constructed on the suit property in 2006 after he left John's homestead which had been constructed in 1971. It was his testimony John's homestead stood in a parcel of land known as 2238.
18. As for the previous cases, he testified the criminal case of trespass involved John and that notwithstanding the plaintiff's family being unsuccessful in the civil cases over 136, they continued with occupancy.

### **Parties' submissions**

19. As directed by the court, the plaintiff's law firm on record Ms. Maxwell O. Ogonda & Ass. Advocates filed his written submissions dated 29/05/2024 whereas the defendants' law firm on record Ms. Agina & Ass. Advocates filed written submissions dated 9/06/2024.
20. 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 and legal authorities they relied upon to advance their respective arguments.

### **Issues for determination**

21. I have considered the pleadings, adduced evidence and rival written submissions. Being guided by well-cited provisions of law and legal authorities that have been highlighted in the submissions, I 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 his claim of adverse possession to the required standards.
  - II. What appropriate orders should be granted including an order as to costs?

### **Undisputed facts**

22. It was undisputed that the plaintiff was in occupation of the suit property and that the 2<sup>nd</sup> defendant was the registered owner having purchased it from the 1<sup>st</sup> defendant. It was also undisputed that Buong and the plaintiff's grandfather had previously litigated over a parcel of land.

### **Analysis and Determination**

23. The issues that were earlier recognized as arising for determination shall be addressed together.
24. The doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire valid title to it, so long as certain common law requirements are met, and the adverse possessor has had it for a sufficient period, as defined by the *Limitation of Actions Act*.
25. Since the 1<sup>st</sup> defendant is not the registered owner of the suit property, this court finds the suit against him was incompetent.
26. Section 7 of the *Limitation of Actions Act* states the definition of adverse possession as follows:

“an action that may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”



27. As submitted by the plaintiff's counsel, Section 38 of the *Limitation of Actions Act* authorizes a person who claims to have been entitled to land by adverse possession to apply to the court for an order that he be registered as the proprietor in place of the registered proprietor.
28. Section 28 (h) of the *Land Registration Act* is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.
29. As was held in *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 that was cited with approval in the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the primary function of the court in dealing with adverse possession is to draw legal inferences from proved facts and such inferences are matters of law. In such claims, proof of all principles of adverse possession must co-exist and be strictly proved.
30. The principles of adverse possession are well settled and can be drawn from the Court of Appeal of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] which summarized them as follows: -

“In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”
31. Having pleaded the claim of adverse possession, the onus was on the plaintiff to strictly prove his claim.
32. Regarding the facts of this case, the parties made heavy weather on 136 and contended the suit property was a subdivision thereof. This is far from reality. The green cards of these properties illustrate they were all 1<sup>st</sup> registrations and were both registered on the same date of 3/11/2004. Therein, Buong was registered as the owner of 136 and Michael that of the suit property.
33. I have been unable to relate the suit property to Siaya DM LC 6 of 1970 which was between Asadho Oriaro (Asadho) and Obuong and whose final appeal rested with Kisumu HC CA 5/71. It emerged that Asadho was the plaintiff's grandfather but I have been unable to establish the relationship between the 1<sup>st</sup> defendant and Buong.
34. Be that as it may, I do entertain in my mind that even if these proceedings do not disclose the parcel no. that was in dispute, the subject suit land was 136.
35. This can conspicuously be seen from the minister's ruling during the adjudication process where when John challenged Buong's registration over 136 in case no. 202 of 1992, the minister in a decision of 2/09/1996, dismissed John's claim for being res judicata. The minister's decision is reflected in 136's green card.
36. Thus, it follows the defendants' arguments that these decisions interfered with time and deemed the plaintiff's occupation as chaotic and hostile do not hold water. I have also not come across any criminal proceedings between the parties.
37. The question that arises is when did time start running for purposes of adverse possession?
38. The plaintiff testified that time started to run either in 1971 when John entered the suit property or in 2006 when he entered it. The plaintiff's evidence did not account for John's structure that ostensibly stood on the suit property.



39. DW2 who from the evidence was more conversant with the suit property than the defendants, departed from his earlier testimony and instead corroborated the plaintiff's evidence and stated the plaintiff entered the suit property in 2006.
40. Although the defendants averred the plaintiff entered the suit property in 2018, this court is not persuaded by this line of evidence. The 2<sup>nd</sup> defendant testified that when he purchased the suit property, the plaintiff resisted his entry and that he found several homesteads therein. This was in contradiction to his earlier testimony that the plaintiff entered the suit property in 2018. I am persuaded the plaintiff entered the suit property in 2006.
41. DW2 testified the plaintiff has never been evicted since he took possession of the suit property. Further, the 2<sup>nd</sup> defendant did not rebut this by demonstrating that upon his purchase, he made an effective entry onto the suit property or upon his registration, he took positive steps to assert his rights as was held in the Court of Appeal decision of Peter Kamau Njau v Emmanuel Charo Tinga [2016] KECA 167 (KLR);

“In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. See *Njuguna Ndatbo V Masai Itumu & 2 Others Civil Appeal No 231 of 1999*.”

42. In claims of adverse possession, the crucial period of occupancy by a claimant is 12 years. This court has established the plaintiff entered the suit property in 2006 and continues to so occupy it to date. This suit was filed on 26/02/2021 and the import of this is that the plaintiff's claim was ripe having been filed 15 years from the date of entry.
43. Even if the 2<sup>nd</sup> defendant became the registered owner long after the purchase for value took place in 2012, he was never put in a better position than his predecessor in title who was the 1<sup>st</sup> defendant and he purchased it subject to the rights of the plaintiff who was in occupation.
44. Even if the 2<sup>nd</sup> defendant purchased the suit property in 2012 and was registered as the owner on 10/1/2019, time for purposes of adverse possession had already begun to run in favour of the plaintiff against the 1<sup>st</sup> defendant's title. On this, I am bound by the decision of Peter Kamau Njau (Supra) which stated: -

“... it is settled law that the mere change of ownership of land adversely occupied by another will not interrupt or stop time from running. See *Janet Ngendo Kamau vs. Mary Wangari Mwangi Civil Appeal No. 173 of 2003*”

45. He also produced photographs which showed several houses, a fence, farming activities and mature trees all of which allegedly subsisted on the suit property.
46. This plaintiff's evidence was corroborated by DW2. I am persuaded by the plaintiff's testimony that his occupation was continuous, open, without force and without the 2<sup>nd</sup> defendant's permission. I find the plaintiff has met the ingredients of adverse possession.
47. 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 2<sup>nd</sup> defendant. The plaintiff shall bear the 1<sup>st</sup> defendant's costs. In the end, I make the following final disposal orders;



- a. A declaration that the title in the name of William Oduor Okello in respect to land parcel no. Siaya/obambo/2135 has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.
- b. That the plaintiff has become entitled to adverse possession of land parcel no. Siaya/obambo/2135 registered in William Oduor Okello's name.
- c. An order that the Land Registrar Siaya does register the plaintiff as absolute proprietor of land parcel no. Siaya/obambo/2135 in place of William Oduor Okello.
- d. That the Land Registrar Siaya be directed that the order herein shall be an instrument of transfer of ownership of the whole of land parcel no. Siaya/obambo/2135 from William Oduor Okello to the plaintiff.
- e. The plaintiff's suit against the 1<sup>st</sup> defendant is struck out with costs to him.
- f. The 2<sup>nd</sup> defendant shall bear the plaintiff's costs of the suit.

Orders accordingly.

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

**HON. A. Y. KOROSS**

**JUDGE**

**31/10/2024**

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

In the Presence of:

N/A for the plaintiff

Mr. Agina for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Court assistant: Maureen Achieng

