



**Achieng v Odhong & another (Environmental and Land Originating Summons
E012 of 2024) [2024] KEELC 7047 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2024**

E ASATI, J

OCTOBER 24, 2024

IN THE MATTER OF THE LAND REGISTRATION ACT (CAP 300)

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22)

AND

IN THE MATTER OF LAND PARCEL NUMBER KISUMU/NYALUNYA/2137

AND

IN THE MATTER OF LAND PARCEL NUMBER KISUMU/NYALUNYA/2138

BETWEEN

PETER OTIENO ACHIENG PLAINTIFF

AND

JOSHUA OMBUYA ODHONG 1ST DEFENDANT

MARGARET AUMA OWITI 2ND DEFENDANT

RULING

1. The application seeks for an order of temporary injunction restraining the Defendants from fencing, sub-dividing, building on, alienating or otherwise dealing in or interfering with the Plaintiff's quiet possession and enjoyment of the suit lands.
2. The application is based on the grounds that the Plaintiff has been in possession of the suit land for over 12 years. That the Defendants have sought to realign, fence, alienate and/or forcefully take possession of the suit parcels of land.



3. That the Defendants are the current registered owners of the suit land having acquired title in the year 2023 while the Plaintiff has been in occupation since November, 2005.
4. That the Defendants have resorted to violent and forceful entry and wanton destruction of the Plaintiff's developments on the land thereby putting to risk the plaintiff's life and that of his family.
5. The application was supported by the averment in the Supporting Affidavit of the Applicant sworn on 2nd May, 2024.
6. The application was opposed by the 1st Defendant vide the Replying Affidavit sworn on 20th May, 2024. The 1st Respondent's case is that it is not true that the plaintiff established his home where he claims it is in the year 2006. That the plaintiff entered land parcel numbers KISUMU/NYALUNYA/2137 and 1481 in the year 2014. That land parcel number KISUMU NYALUNYA /2138 belongs to him and that he bought it from John Maseku Nyagol. That he also bought parcel No. 1481 from a neighbor known as Ogola Owiti. That he established his home on parcel No. 2137 belonging to the 2nd defendant thinking that it was Parcel number 1481.
7. That in the year 2014 the plaintiff encroached onto parcel numbers 1481 and 2138. That on parcel number 1481 the plaintiff had partly fenced off as part of his home while he grew crops on No. 2138. That in the year 2017 he found out that the plaintiff was putting up a permanent house on parcel number 2137 which the 1st Defendant had bought from the 2nd Defendant. That the plaintiff did not stop the construction in spite of the 1st defendant's attempts to stop him. That hence there is a permanent house on parcel number 2137. That after survey took place in April 2024, he (1st Defendant) moved in and fenced off parcel number 2138 which he has possession of.
8. The case of the 2nd Respondent as contained in the grounds of opposition dated 20th May, 2024 is that the application is a clear abuse of the court process intended to create legal confusion, morass, elevate costs unnecessarily and waste precious judicial time, the Plaintiff having failed to meet the threshold for grant of injunctive orders.
9. That the application is incompetent, frivolous, misconceived and ought to be dismissed with costs.
10. It was submitted on behalf of the applicant that there is a prima facie case. That the Plaintiff took up occupation of the suit land and has his home on the suit land since November, 2005. That the basis of the 1st Defendant's claim is a sale agreement which neither proves ownership of the parcel nor occupation on the part of the 1st Respondent. That the said agreement does not prove interruption of occupation for purposes of computation of time.
11. Counsel relief on the case of *Joseph Kamau Gichuki (suing as the administrator of the Estate of Gichuki Chege (deceased) –vs- James Gatheru Mukora & Another* (2019)eKLR to support the submission that death of a registered owner does not stop time from running for the purpose of adverse possession.
12. On whether the Applicant will suffer irreparable loss, Counsel submitted that land parcel No.2137 hosts the Plaintiff's home while parcel number 2138 has been under the Plaintiff's cultivation since 2005 and further submitted that the balance of convenience tilts in favour of the Plaintiff for the reason that the Plaintiff and his family stands to suffer irreparable harm and they stand to be evicted from their house before the suit is determined.
13. On behalf of the 2nd Respondent, it was submitted that the Applicant has not demonstrated a prima facie case with a probability of success. That the Originating Summons was filed prematurely as a period of 12 years has not elapsed since the Respondents became registered owners of the respective suit lands.



14. Secondly that the Respondents have not been properly sued for the claim of adverse possession.
15. That the proper defendants should be the administrators of the estate of the deceased.
16. That the structures alleged to be on the suit parcels are quantifiable and can be compensated by way of an award of damages hence the Plaintiff will not suffer irreparable injury. That the balance of convenience tilts in favours of the Respondents.
No submissions were filed on behalf of the 1st Respondent.
17. I have considered the application and the grounds of opposition thereto. It appears that as at the time of filing suit, the 1st Defendant had already fenced off and taken possession of land parcel No. KISUMU/NYALUNYA/2138 which is also registered in his name.
18. It was admitted that the Applicant has a permanent house on parcel No. KISUMU/NYALUNYA/2137.
19. Whether there has been adverse possession or not is a matter to be decided upon hearing the evidence.
20. For now, there is need to preserve the status quo of the suit lands pending hearing and determination of the suit. The application therefore succeeds as follows; -
 - a. The status quo obtaining in respect of the title, use and occupation of the suit land as at the date hereof be maintained and respected by both parties pending hearing and determination of the suit. For avoidance of doubt the parties are restrained from further or new fencing, survey, construction, selling, charging, letting or in any manner disposing of the suit land pending hearing and determination of the suit.
 - b. No order as to costs.
21. Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 24TH DAY OF OCTOBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Ann & Alex- Court Assistant.

Jeji for the Applicant.

C. Onyango for the Respondent.

Okoth for the 2nd Respondent.

