



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Onchiri & 2 others (Environment and Land Case E003 of 2023)
[2024] KEELC 6857 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E003 OF 2023
AY KOROSS, J
OCTOBER 17, 2024**

BETWEEN

ROY EVANS ONYANGO OTIENO PLAINTIFF

AND

LAUGHTON GECHIKO ONCHIRI 1ST DEFENDANT

STEPHEN OCHARO ROGENA 2ND DEFENDANT

GEORGE MAOSA MASESE 3RD DEFENDANT

JUDGMENT

1. This suit is instituted by an originating summons (OS) dated 22/08/2023 in which the plaintiff sought to be deemed an adverse possessor of land parcel no. Siaya/Karapul Ramba/507 (suit property) which measures 0.09 Ha. The suit property is registered in the defendants' names.
2. The OS is buttressed by grounds in support thereof and on the affidavit of the plaintiff that he deposed on 22/08/2023 together with several annexures in support thereof.
3. Despite service, the defendants did not file any documents to refute the plaintiff's claim and therefore, the plaintiff's claim is undefended.
4. It is the plaintiff's case that he had allegedly acquired the suit property by adverse possession and seeks the following reliefs: -
 - a. A declaration that he has acquired the suit property by adverse possession and the defendants' rights over it have been extinguished and they held it in trust for him.
 - b. An order for the suit property to be transferred and registered in his name.
 - c. An order for the defendants to transfer the suit property to him and in default, the deputy registrar does execute the transfer instruments.



- d. Costs be borne by the defendants.
5. The suit proceeded by viva voce evidence and the plaintiff testified as PW1 and his evidence was composed of his affidavit, witness statement, oral testimony, and documents he produced and marked as Pex.1- 9.
 6. It was his testimony on 27/10/2004, he bought the suit property from Daniel Oduor Otieno (Daniel) who had himself bought it from the defendants. He averred that it was a term of the agreement between Daniel and himself that the defendants would transfer the suit property to him even so, this has not materialized.
 7. Further, he stated that Daniel was now deceased and that he and Daniel's family have made attempts to trace the defendants for purposes of executing transfer instruments but to no avail.
 8. It was his position that since purchase, he had been living on the suit property together with his family and that he had met the ingredients of adverse possession. He testified that his sister currently occupied the suit property with his permission as his work assignment was not within the jurisdiction of Kenya.
 9. After hearing the plaintiff and closing the parties' cases, this court directed the plaintiff's counsel on record M/s. Betty Wamukore & Owiti Advocates to file written submissions. The plaintiff's counsel complied by filing written submissions dated 29/04/2024. However, the defendants did not file any submissions.
 10. The plaintiff's submissions did not identify any issues for determination but counsel relied on the Court of Appeal decision of Wilfred Kegonye Babu v Henry Mose Onuko [2019] eKLR which dealt with the doctrine of adverse possession.
 11. I have considered the plaintiff's pleadings, adduced evidence, submissions, and the well-cited judicial precedent, and the issues arising for determination are: -
 - 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?
 12. Because the two issues are interconnected, they shall be dealt with together.
 13. 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.
 14. 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.
 15. By the provisions of Section 17 of the [Limitation of Actions Act](#), at the expiration of 12 years from the date of entry to land, a person can bring an action to recover land, and the registered proprietor's title may be extinguished.
 16. Further, Section 38(1) of this Act provides, that a person who has become entitled to land as stipulated in Section 37, may apply to a court with jurisdiction over environment and land court matters for an order that he be registered as proprietor in place of the person then registered.
 17. Additionally, by Section 38(2) thereof, an order made under Section 38 (1) shall on registration, take effect subject to any entry on the register which has not been extinguished under the Act.



18. The guiding principles of adverse possession were well outlined in the Supreme Court of India decision of *Karnataka Board of Wakf vs. 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 these 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.”

19. 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.
20. 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 demonstrated.
21. In the instant case, the plaintiff produced a green card which showed the defendants are the registered owners 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.
22. Claims of adverse possession by purchasers of properties are now settled and, in such claims, time for purposes of adverse possession starts to run upon payment of the balance of the purchase price. The Court of Appeal decision of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR stated as follows on this settled legal issue: -

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession 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 off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

23. Turning to this case and anchored on documentary evidence, the defendants who were tenants in common with a third share each, christened themselves as ‘Gomu Partnership’ and offered the suit property for sale on 23/6/1979. The offer included not only the suit property but their houses therein. In other words, with vacant possession.
24. From the evidence, Daniel took up the offer and a duly written agreement was entered on 27/09/1979. By the terms of the agreement, the purchase price was kshs. 81,500/- in which a deposit of ksh.19,000/- was made on the same date and the balance was to be made in 3 installments. Some portions of the agreement for sale are illegible and the court is unable to decipher the contents.



25. As per the agreement, Daniel was to have possession of the suit property with effect from 30/09/1979, and by an addendum agreement between Daniel and the defendants, he paid the final balance of the purchase price of kshs. 1,000/- on 8/03/1983.
26. Despite the agreements alluding that the defendants would execute all necessary documents for purposes of conferring title upon Daniel, it is evident this was never done. In addition, there is no evidence to contradict the terms of the agreement that Daniel took possession of the suit property on 30/09/1979.
27. Daniel subsequently sold the suit property to the plaintiff; however, this court is uncertain of the terms as a written agreement for sale was not tendered to this court nor were disclosures made of whether it was oral or written but what is certain, is that the final balance of the purchase price of kshs. 6,900/- was by a written agreement, paid by the plaintiff to Daniel on 27/10/2002.
28. Having been put in possession and fulfilling the terms of the agreement by paying the balance of the purchase price on 8/03/1983, time for purposes of adverse possession became ripe in Daniel's favour from 8/03/1995 which was 12 years thereafter.
29. There is no evidence to allude that Daniel's occupation was not peaceful, open, continuous, public, exclusive, or visible from 8/03/1983 to 27/10/2002. This period was a span of 19 years and it followed the defendants held the suit property in trust for Daniel.
30. The issue that suffices is could the rights accrued by Daniel be enjoyed by the plaintiff? To answer this, this court has to look at the legal concept of tacking which applies in claims of adverse possession. Tacking has been defined and explained by the Black's Law Dictionary, 11th Edn, page 1754 in the following terms: -

“The joining of consecutive periods of possession by different persons to treat the periods as one continuous period; esp., the adding of one's own period of land possession to that of a prior possessor to establish continuous adverse possession for the statutory period.”
31. For tacking to suffice, there has to be a nexus between the successive occupiers of a parcel of land and this was expounded in the decision of Gabriel Mbui v Mukindia Maranya [1993] eKLR where Kuloba J (as he then was) stated thus in his obiter dictum;

“Tacking is allowed, provided there is a sufficient nexus, often called “privity”, between successors. The nexus will be sufficient if the earlier possessor gives the next one a colourable title document or if the next one is his heir, and there is no interruption.”
32. From the adduced evidence, Daniel sold his accrued interest in the suit property to the plaintiff thus granting him some colourable title to the suit property and there was no interruption when he took over the suit property upon payment of the final balance to Daniel on 27/10/2002.
33. On application of the doctrine of tacking, the period from the time Daniel's claim of adverse possession accrued on 8/03/1995 to the time of filing suit on 23/08/2023 is 28 years.
34. Similar to Daniel, there is no evidence to contradict that the plaintiff's occupation was peaceful, open, continuous, public, exclusive, visible and without the consent of the defendants.
35. 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 defendants. In the end, I make the following final disposal orders;

- a. A declaration that the title in the names of LAUGHTON GECHIKO ONCHIRI, STEPHEN OCHARO ROGENA, and GEORGE MAOSA MASESE in respect of SIAYA/KARAPUL RAMBA/507 has been extinguished by ROY EVANS ONYANGO OTIENO's adverse possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.
- b. A declaration that ROY EVANS ONYANGO OTIENO has become entitled by adverse possession to SIAYA/KARAPUL RAMBA/507 which is registered in the names of LAUGHTON GECHIKO ONCHIRI, STEPHEN OCHARO ROGENA, and GEORGE MAOSA MASESE.
- c. An order that the Land Registrar Siaya or any other competent land registrar does register ROY EVANS ONYANGO OTIENO as absolute proprietor of land parcel no. SIAYA/KARAPUL RAMBA/507 in place of LAUGHTON GECHIKO ONCHIRI, STEPHEN OCHARO ROGENA, and GEORGE MAOSA MASESE.
- 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/KARAPUL RAMBA/507 from the names of LAUGHTON GECHIKO ONCHIRI, STEPHEN OCHARO ROGENA, and GEORGE MAOSA MASESE to that of ROY EVANS ONYANGO OTIENO.
- e. Costs of the suit are awarded to the plaintiff.

36. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

17/10/2024

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

Mr. Owiti for the plaintiff

N/A for 1st defendant

N/A for 2nd defendant

N/A for 3rd defendant

Court assistant: Ishmael Orwa

