



Okumu & another v Oor (Enviromental and Land Originating Summons E007 of 2023) [2024] KEELC 13285 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023
AY KOROSS, J
NOVEMBER 21, 2024**

BETWEEN

PATRICK OCHIENG' OKUMU 1ST PLAINTIFF

FREDRICK OKOTH OCHIENG 2ND PLAINTIFF

AND

PETER ODERO OOR DEFENDANT

JUDGMENT

Parties' cases

1. This suit was instituted by an originating summons (OS) dated 18/10/2023 in which the plaintiffs sought to be deemed adverse possessors of land parcel no. Uholo/Rambula/499 (suit property) which measures 0.44 Ha.
2. The suit property is registered in the defendant's name, and all the parties herein have close family relations, as the defendant and Paul Ochieng Owuor (Paul), the plaintiffs' father, are brothers. In other words, the defendant is the plaintiffs' uncle.
3. The OS was supported by a joint affidavit deposed by the plaintiffs on 18/10/2023. The plaintiffs sought the following reliefs from this court: -
 - a. An order that the plaintiffs together with their entire family had been in adverse possession of the suit property for over 12 years.
 - b. An order that upon the expiry of 12 years since the plaintiffs were in possession of the suit property, the defendant's rights over it had been extinguished by operation of the law.
 - c. An order that the defendant held the suit property in trust for the plaintiffs.



- d. An order that the suit property be transferred from the defendant's name to the plaintiffs' name for them to hold in trust for themselves and other family members.
 - e. An order that the defendant does execute the instruments of transfer in favour of the plaintiffs and in default, the deputy registrar of the Hon. court to so do.
 - f. Costs of the suit be borne by the defendant.
4. The OS was strenuously opposed by the defendant who filed an amended replying affidavit that he deposed on 12/03/2024 and attached to it, were photographs allegedly of the suit property.

Plaintiffs' evidence

5. The matter thereafter proceeded for hearing by viva voce evidence and the 1st plaintiff testified as PW1 and his evidence was composed of his oral testimony, adopted witness statement, and documents he produced in support of his case and were marked as Pex.1- 2. They were a green card of the suit property and a demand letter from their counsel to the defendant.
6. It was the 1st plaintiff's testimony that in the 1980s, Paul who was deceased bought the suit property from Ouma Oyal (Oyal) who was also deceased. He stated that his deceased 3 mothers farmed on it in the past but for over 12 years now, he and the 2nd plaintiff made use of the suit property and he even lived in it.
7. Later in his testimony, he averred his house was in Uholo/Rambula/530 (530) and his family no longer lived on the suit property. He stated that he had misled the court when he testified that he lived on the suit property.
8. He stated he did not have any evidence to show he and his family entered the suit property in the 1980s. He averred he stopped making use of the suit property in June 2023 and by Pex. 2, he was seeking an eviction of the defendant.

Defendant's evidence

9. The defendant testified as DW1 and his evidence was composed of his oral testimony, amended replying affidavit, and photographs he produced as Dex.1.
10. It was his testimony he had always farmed on the suit property save for an interlude in August 2020 when he permitted the plaintiffs to cultivate it for 2 seasons.
11. It was his testimony when the permission was terminated in 2021, he resumed farming as evidenced by Dex.1 which were his crops that were subsisting on the suit property.

Parties' submissions

12. Upon closing parties' cases, this court directed counsels to canvas it by written submissions, and in compliance, their counsels filed written submissions.
13. The plaintiffs' law firm on record Ms. Ben Aduol Nyanga & Co. Advocates filed their written submissions dated 17/09/2024 and they identified 3 issues for determination which were whether the plaintiffs were in occupation of the suit property, whether they had a cause of action and whether they were entitled to the orders sought.



14. The defendant's law firm on record M/s. C.Obiero & Ass. Advocates filed written submissions dated 22/09/2024 and identified a single issue for determination; whether the plaintiffs' claim had met the legal requirements of adverse possession.
15. 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 the law they relied upon to advance their respective arguments.
16. Despite both counsels relying heavily on legal authorities, none of them were tendered to court and on that basis, these authorities will not be considered.

Issues for determination

17. I have considered the pleadings, adduced evidence, and rival written submissions. Being guided by well-cited provisions of law that have been highlighted in the submissions, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim, and the issues for determination are:-
 - I. Whether the plaintiffs proved their claim of adverse possession to the required standards.
 - II. What appropriate orders should be granted including an order as to costs?

Analysis and Determination

18. The 2 issues that have been identified as arising for resolution shall be dealt with together.
19. The doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof.

Section 7 provides that:

“An action may not be brought by any person to recover land after the end of twelve 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.”

Section 13 states that: -

“

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, 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 ceases 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 purposes 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.”



Lastly, Section 38 (1) elucidates that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

20. The principles of law on adverse possession are settled in Kenya and the burden is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards.
21. In their submissions, both counsels thrashed this issue to the pulp with the plaintiffs’ counsel contending that the plaintiffs had met the threshold of adverse possession while the defendant’s counsel asserted the 1st plaintiff’s evidence was contradictory.
22. Significantly, the plaintiffs’ counsel introduced matters of evidence in his submissions ostensibly on the existence of another court case, yet that issue never arose during the trial. Counsels are reminded that submissions are arguments and not evidence.
23. Pointedly, it must be borne in mind that claims of adverse possession are matters of facts that are observed on the land.
24. The criteria that an adverse possessor must satisfy was stated as follows in the persuasive case of Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1977] eKLR: -

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see *Wanyoike Gathure v Beverly* [1965] EA 514, 518, 519, per Miles J.”

25. I concur with this decision that a claimant has to first demonstrate occupancy and possession of a suit property and once this 1st legal hurdle is met, then the court proceeds to analyze whether the claimant has met the other conditions.
26. The plaintiffs’ counsel argues that the 1st plaintiff proved occupancy while the defendant’s counsel is of a contrary view. In appreciation of the evidence as presented by the parties, I must agree with the defendant’s counsel.
27. The plaintiffs did not tender any evidence to show that they were in occupation such as by producing a survey report, photographs, or records to show they drew an income from the suit property or even call neighbours to substantiate their allegations.
28. Apart from the 1st plaintiff’s assertions, there was no shred of evidence that the plaintiffs or their mothers ever occupied the suit property. Further, I find the 1st plaintiff’s evidence contradictory, untruthful and full of falsehoods as it emerged he did not reside on the suit property.



29. In fact, the demand letter from his advocates dated 15/11/2022 confirms he was not in occupation but rather the defendant was. This is self-evident by the eviction notice against the defendant that in verbatim stated: -

“Take stern notice that unless you move out of our clients’ family land parcel no.Uholo/Rambula/499...” Emphasis added.

30. The defendant indeed confirmed that he was the one in occupation of the suit property by producing photographs showing a maize plantation that was enclosed within a barbed wire fence.

31. His evidence that he was the one in occupation was never rebutted by the plaintiffs. I need not say more. I find the plaintiffs are not in possession or occupation of the suit property.

32. Ultimately, for the reasons and findings stated above, it is my ultimate finding the plaintiffs did not prove their claim to the required standards. It is trite law costs follow the event. Because of the special relationship between the parties, each party shall bear their respective costs of the suit. In the end, I make the following final disposal orders;

a. The plaintiffs’ suit against the defendant is hereby dismissed.

b. Each party shall bear their respective costs of the suit.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

21/11/2024

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

In the Presence of:

Mr. Nyanga for the plaintiff

Mr. Obiero for the defendant

Court assistant: Ishmael Orwa

14 days right of appeal.

