Omwenga & another v Ouko & 2 others (Enviromental and Land Originating Summons 416 of 2018) [2025] KEELC 1323 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1323 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 416 OF 2018

LN MBUGUA, J

FEBRUARY 12, 2025

BETWEEN

NAHASHON KEBWARO OMWENGA ..... 1ST PLAINTIFF

MARCELLA OMWENGA ..... 2ND PLAINTIFF

AND

ROSELYN DOLA OUKO ..... 1ST DEFENDANT

AARON TAFARI OUKO ..... 2ND DEFENDANT

DAVID SCOTT ONGOSI ..... 3RD DEFENDANT

JUDGMENT

1. This suit was commenced vide originating summons dated 24.1.2013 where the plaintiffs are seeking a declaration that they are entitled through adverse possession to land parcel LR 3589/51 (original number 3589/6/20) measuring 0.6899 hectares (hereinafter plot 51) and LR No. 3589/53 (original number 3589/6/21) measuring 1.121 hectares (herein after plot 53) curved out of parcel LR No. 3589/6 registered to the late Jason Atinda Ouko (herein referred to as the deceased) hence the said 2 parcels should be registered in their names.

2. To this end, the plaintiffs seek a determination on whether the deceased did transfer the suit parcels to them on 10.6.1993 and 26.6.1993 and whether a vesting order should be issued in their favour. Additionally, they seek a permanent injunction to restrain the estate of the deceased from interfering with the suit parcels, compensation by the defendants jointly and severally for interfering with their quiet possession of the suit parcels as well as costs of the suit.

3. The Originating summons are supported by the 1st Plaintiff's supporting affidavit sworn on 24.1.2013 and his further affidavit sworn on 19.12.2019.

4. The suit is opposed by the defendants vide a replying affidavit sworn by the 2nd defendant on 13.9.2019. He contends that that in year 1993, the plaintiffs were to buy parcel 3589/51 from his father at a price of sh.400 000, but they only paid Ksh. 10,000. As for parcel 3589/ 53, the same had been disposed off to Mr. Waithaka (Plaintiff in Elc 148 of 2021) by the deceased.

Plaintiff's Case

5. The plaintiffs called 2 witnesses to advance their case, with the 1st plaintiff Nahashon Kebwaro Omwenga testifying as PW1. He adopted his affidavits sworn on 24.1.2013 and 19.12.2019 as his evidence in chief and produced 2 transfer documents dated 26.6.1993 and 10.6.1993 as P. Exhibit 1& 2. He also produced annexures to his affidavit sworn on 19.12.2019 as P. Exhibit 3-6.

6. In his affidavits, PW1 avers that about the year 1993, he entered into an agreement with the deceased to purchase the two suit plots (51 and 53) and subsequently, transfers were executed by the deceased whom he paid the full purchase price as per the affidavit of PW2 sworn on 18.6.2012. That his family took possession and established their home and have resided thereon uninterrupted for a period of more than 20 years.

7. That though the deceased transferred the suit parcels to him, the transfers could not be effected given the many restrictions/caveats placed on the parent title and he eventually passed away before he could resolve the said issue of caveats.

8. That on 8.9.2011, they received notices from advocates for the administrators of the deceased's estate asking them to regularize their position or face eviction.

9. In cross-examination, PW1 stated that he paid the late Ouko the full purchase price for the suit parcel and that his evidence to that effect are the transfers as he did not have a sale agreement/ acknowledgement receipt or banking slip indicating payments made to the deceased adding that even the affidavit of PW2 does not make reference to a sale agreement as he did not sign the sale agreement at PW2'S office.

10. He averred that he is occupying parcel 3589/51 and 53 which he took possession of with permission of the deceased pending signing of the agreements and later they went to an advocate (Yuvinalis Okubo) where the deceased signed the transfers.

11. He stated that he had paid the deceased ksh.10, 000/= by the time he took possession and the balance of ksh.390,000/= he paid by installments .

12. PW1 avers that he didn't enter plot 51 forcefully, adding that there were no buildings/improvements thereon as at that time..

13. He also indicated that he did not have documents to challenge the expert report of DW2.

14. In re-examination, PW1 reiterated that he paid the deceased the whole purchase price of ksh.400, 000/ = in cash and by installments, adding that they had no sale agreement because they were close friends and they just verbally agreed and that he has even sold portions of the suit parcel to 3 people, a fact known by the deceased's family.

15. He also stated he was not charged with forgery at any court in relation to the subject transfers herein.

16. The plaintiffs' 2nd witness, PW2 was Fackson Kagwe who adopted his affidavit sworn on 18.6.2012 as his evidence in chief. He avers that the deceased appointed him to act for him regarding all conveyancing matters pertaining to parcel LR No.3589/6 and furnished him with a list of buyers

which was received by his firm on 1.11.1994, of which that the said list indicated the plaintiffs as purchasers for sub-plots No.7 & 8.

17. He further avers that late Ouko deposited with him copies of transfers for the two suit plots 51 & 53 which were duly executed by him and stamped .

18. In cross-examination,PW2 stated that the list of buyers annexed to his affidavit was availed to him by the deceased who had instructed him to sign documents on his behalf, but he did not have a written authorization to that effect. He stated that the said list does not specify the particular land parcels, it does not indicate the name of the deceased nor his signature and that the names appearing at No. 7 and 8 of the list are not complete names ,it is just indicated "Omwenga".

19. PW2 also averred that plot 7 and 8 became plots LR 3589/51 and 53 after survey, adding that he received a transfer with a deed plan attached, but he did not witness execution of the said transfers, he was not given any agreements for sale and was not given any acknowledgement for payments by the deceased but he confirmed to him verbally that payments for the plots were fully made.

20. He also stated that by the time the deceased died, he had not been given the land control consents for the transfers.

21. PW2 also revealed that he was paid fees to prepare his affidavit sworn on 18.6.2012 and ksh.25,000/= to attend court and did not seek approval from administrators of the estate of Ouko who was his client as their relationship ended when he died.

22. In re-examination, PW2 clarified that he was paid fees to prepare the affidavit sworn on 18.6.2012 in the ordinary course of practice as an advocate.

Defendants' Case

23. The defendants called 2 witnesses with the 2nd defendant Aaron Tofari Ouko testifying as DW1. He adopted his affidavit sworn on 13.9.2019 as his evidence in chief and he produced 6 documents as their exhibits.

24. His testimony is that the plaintiffs' claim is of a purchaser's interest arising from a sale agreement entered between the deceased and the plaintiffs in 1993, of which the deceased sold to them plot 51 at ksh.4000,000/= out of which the 1st plaintiff only paid ksh.10,000/= which represents merely 2.5 % of the purchase price, took possession and started farming, but they did not pay the deceased the balance and had not done so even at the time of his death in February 1996.

25. He avers that he confronted the plaintiffs after the deceased's death over the balance, of which they indicated that they were going through financial difficulties but would endeavor to clear the balance.

26. He also avers that plaintiffs requested the deceased to allow them to utilize the adjoining plot 53, of which the deceased obliged.

27. That in 2010 after a grant was issued to the defendants, they issued communication to all persons in occupation of parcel LR No. 3589/6 registered to the deceased seeking that they regularize their stay and also avail necessary documentation in support of their respective claims. But instead of responding, the plaintiffs moved the court to be enjoined as interested parties in the case Elc 311 of 2011 (O.s) Dr. Charles Maranga v Estate of Jason Atinda purporting to have fully paid the purchase price and purporting that the deceased had executed transfers in his favour.

28. Dw1 is aware that plot 53 was the subject of a sale agreement dated 30.3.1983 between the deceased and one Martin Thuku Waithaka and that in separate proceedings being Civil suit No.673 of 1985; the court found that one Joseph Kamau Ngiria is entitled to an acre of the said plot 53 .

29. He also avers that the plaintiffs' contention that the deceased executed transfers in their favour is false since the signatures on the alleged transfer documents don't belong to the deceased as confirmed by a forensic document examiner-DW2, adding that the affidavit of PW2 sworn on 18.6.2012 constitutes forgery to the extent that he suggests that the deceased executed transfers in favour of the plaintiffs as the said Pw2 has no evidence to demonstrate any instructions given to him by the deceased.

30. It is also averred that the plaintiffs proceeded to dispose of portions of LR 3589/51 to several persons, namely John Kimathi Mworia, Juvenalis Momanyi Awisi and Joseph Mutuma Mutwiri which revelation came up after the estate of the deceased had challenged the presence of one John Mworia on the suit land vide Nairobi Civil Suit No.502 of 2011; Estate of Jason Atinda Ouko v John Mworia.

31. In cross-examination, DW1 confirmed that the deceased sold land to the plaintiff and they have been there since 1993 with consent from his father, but he could not confirm whether they were consistently there.

32. He explained that it is not the deceased's death that prevented the conclusion of the transaction, adding that the plaintiffs only paid his father ksh.10, 000/- but he had no evidence to indicate that that was the only monies paid to his father.

33. He also averred that despite alleging forgery in his affidavit, the plaintiffs were not charged in a criminal court for forgery.

34. In re-examination, DW1 stated that the plaintiffs purchased 1 parcel ,i.e LR 3589/51 and were given consent to farm on parcel LR 3589/53.

35. He averred that to date, the plaintiffs have not cleared the balance of the purchase price and that the agreement between them and the deceased has not been terminated. He urged the court to order the plaintiffs to pay the total balance with compound interest or vacate the premises.

36. The defendant's 2nd witness, DW2 was Emmanuel Karisa Kenga, a forensic document examiner and he produced a report dated 26.6.2019 as exhibit 6 for the defence. He avers that he was instructed by the firm of Ahmed Nasir via a letter dated 19.6.2019 to analyse a transfer dated 26.6.1993 marked (ZI) and one dated 10.6.1993 (xi) with the known signature of the deceased marked C. He found no agreement on the signatures as they were written by different authors.

37. In cross-examination, DW2 stated that he worked on the photocopies of the transfer documents and relied on the 2 transfers and the known signature to make a report. He averred that a signature can be affected by age, intoxication/drugs.

Submissions

38. The plaintiffs filed submissions dated 24.7.2024, reiterating the evidence of PW1 and PW2 that the plaintiff paid the purchase price in full and has occupied the suit parcel without interruption. To this end, the case of John Omuse v Sifirosa Akumu Oburon (being the administrator of the estate of Obarasa Matiengi) [2021] eKLR was cited.

39. The case of Wambugu v Njuguna [1983] eKLR and Simon Ng'ang'a Njoroge v Daniel Kinyua Mwangi [2015] eKLR were cited to submit that although possession was initially consensual pursuant to the agreement between the plaintiffs and the deceased, that permission ended when the plaintiffS paid the last installment of the purchase price.

40. The court is urged to disregard the evidence of DW2 because he relied on photocopies instead of the original copies of the documents he examined.

41. The defendants' submissions are dated 3.12.2024 where they argue that although the plaintiffs have constructed a house in Land Parcel No.3589/51, they do not occupy the entire parcel and that they took possession with the deceased's permission but failed to pay the purchase price.

42. It is pointed out that parcel 3589/51 has been subject of litigation between the defendants and one John Mworia in ELCC No.502 of 2011, Aaron Tafari Ouko and 2 others v John Mworia and in its judgement delivered on 3.7.2023,the court issued an eviction order against Mr. Mworia.

43. It is the defendant's submission that the plaintiffs' claim for adverse possession must fail because they failed to identify the size of the land they claim to be in possession of . To this end, the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR is relied upon.

44. It is also argued that the element of adverse possession that possession must be non-permissive and hostile to the owner was not proved as the plaintiffs admit that they took possession with the permission of the deceased.

45. The case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR is cited to submit that the plaintiffS cannot claim adverse possession as well as a purchaser's interest of the same suit property.

46. With regard to the portion known as LR No.3589/53, it was submitted that the plaintiffs have never been in possession and that there are other litigants in Elc (OS) 397 of 2011 Joseph Kamau Ngiria v Rosalyn Dola Ouko and 2 others and Elc suit No.148 of 2021 claiming the same parcel.

47. It is also pointed out that this court conducted a site visit on LR 3589/53 of which it was observed that there are no permanent structures on the parcel measuring 1.5 acres save that there is a stalled construction on the South East corner, constructed by the plaintiffs in blatant disregard of this court's status quo orders and the doctrine of lis pendens.

Determination

48. The plaintiffs claim 2 parcels of land from the defendants, the same being LR 3589/51 and LR No. 3589/53 curved out of LR No. 3589/6 registered to the late Jason Atinda Ouko –(deceased). It is important to point out at the onset that one of the 2 parcels in contention herein, i.e LR 3589/53 is the subject matter in, ELC Civil Suit No. E148 Of 2021 where the estate of Martin Francis Thuku Waithaka has sued the current plaintiffs as well as the defendants claiming the aforementioned parcel through purchase from Jason Ouko (Deceased). It is for this reason that the court delivered a ruling on 2.2.2022 directing the two matters to be heard alongside each other.

49. A perusal of the pleading of the plaintiffs, the Originating Summons dated 24.1.2013 indicates that the only claim lodged by the plaintiffs is that of Adverse possession as set out in the first paragraph of the aforementioned pleadings. All the questions listed for determination running from number 1 to 9 are buttressing the claim of adverse possession. The sentiments advanced by the defendant that the plaintiffs are also pursuing a different claim based on a purchasers interest are therefore unfounded. What is quite apparent is that plaintiffs claim of adverse possession is anchored on purchase of the two suit plots 51 and 53. Thus the issue falling for determination is whether the plaintiffs are entitled to the two suit plots via the doctrine of adverse possession.

50. Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner.This position

has been articulated in a raft of decision including ; Public Trustee v Wanduru Ndegwa [1984] eklr, Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR, Mtana Lewa v Kahindi Ngala Mwangandi COA MALINDI (2015) eKLR Roman Nyoike Mugacia & 4 others v Makindi Banks Limited [2020] eklr. The actions of the claimant must manifest what is known in latin as nec vi, nec clam,nec precario (that is, neither by force, nor secretly and without permission), See Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eklr.

51. In Kasuve v Mwaani Investments Ltd. & 4 Others [2004] eKLR, it was held as follows;

> " In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.

52. Thus for one to succeed in a claim for adverse possession, he must prove the following elements that is :-

    a. He must have made physical entry and be in actual possession of the land for the statutory period of 12 years

    b. The entry and occupation must be with or maintained under some claim or colour of right or title.

    c. The occupation must be non-permissive.

    d. The occupation must evince unmistakable animus possidendi, that is occupation with the clear intention of excluding the owner and all other persons and;

    e. The acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.

51. The plaintiffs through PW1 claimed that they purchased the suit parcels from the deceased in 1993, paid the full purchase price, took possession with the permission of the deceased and that he signed a transfer to that effect in 1993. The defendants do not deny that there was an agreement between the plaintiff and the deceased for purchase of land, but contend that what the plaintiffs were buying was one plot, No. 51 and that they only paid Ksh.10 000 out of sh.400 000.

52. To this end, Dw1 had this to say in cross-examination.

> " I am aware that my father sold land to plaintiff and from records, he had an advocate called Fackson Kagwe. I confirm that plaintiffs have been on that land since 1993 but I don't confirm that they have consistently been on that land".

53. Further at paragraph 13 and 15 of his Replying Affidavit dated 13.9.2019, Dw1 admits that indeed the plaintiffs entered parcel 51 based on an agreement for purchase of the said plot 51 in which Ksh 10,000 was paid by the plaintiff to the vendor (Jason).

54. To prove adverse possession and given that the plaintiffs took possession pursuant to a sale agreement, time for purposes of adverse possession would start running after they had paid the last installment. Pw1 averred that they paid the full purchase price, that is why their names were in the list of purchasers given to Pw2 by the deceased Jason. It is pertinent to note that Dw1 did state that he had no evidence to challenge the payments allegedly made by the plaintiff to the deceased. What more. There is nothing to indicate that Jason ever made any demands for payments during his lifetime, that is until 1996 when he died.

55. In the case of Karugu (Suing as the Personal Representative of Peter Karugu Guandai - Deceased) v Kiburu & 3 others (Environment & Land Case 1375 of 2014) [2023] KEELC 18137 (KLR) (15 June 2023) (Judgment) Neutral citation: [2023] KEELC 18137 (KLR), I cited the case of Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others [2019] eKLR, where the court invoked the latin maxim; " Mortui non morden" which means that "dead men don't bite/ dead men don't tell tales.".

56. Similarly, the defendants cannot purport to challenge the transactions conducted by their father, yet Jason did not challenge those transactions when he was alive. Similarly, the issue raised by the defence that the transfers were forgeries are moot in view of the admission by Dw1 that the plaintiffs entered plot 51 via an agreement with Jason.

57. In Tilak Company Ltd v Mageta Enterprises Ltd (Civil Appeal E080 of 2021) [2024] KECA 342 (KLR),the court of Appeal held that;

> " ...the position is that time starts to run upon payment of the last instalment, or if it has not been paid, upon repudiation of the contract.

58. Going by the averments of Pw2 that he was furnished with the list of buyers by the deceased dated 1.11.1994, then the court computes the time to have started running as from that date.

59. An argument has been advanced by the defendants that they were declared to be the owners of plot 51 through the case 502 of 2011 Ouko & another ((Suing as the Administrators of the Estate of the Late Jason Atinda Ouko)) v Mworia (Environment & Land Case 502 of 2011) [2023] KEELC 18564 (KLR) (3 July 2023) (Judgment). However, the registration of the suit land (plot 51) in the name of Jason is not a subject of contest in the matter at hand. Indeed, the plaintiffs claim is rightly made against the registered owners of the suit plot who happens to be Jason since the said plot was curved out of parcel 3589/6 registered in the name of Jason.

60. Finally, I find that Dw2 has indicated the acreage of the parcel in question (plot 51) to be 2.5.acres, thus again the acreage cannot be made a subject of contest.

61. To this end, I find that the plaintiffs have proved their case on adverse possession in respect of plot 51.

62. However, the threshold of adverse possession has not been met in respect of parcel 53. The court takes judicial notice of existence of the case ELC 148 OF 2018 where by a scene visit was conducted and it was established that the plaintiffs residence is on parcel 51 and not 53. This evidence is buttressed by Dw1 who stated at paragraph 25 of his Replying Affidavit that parcel 53 had been sold to Martin Thuku Waithaka way back in 1983, hence it could not have been sold again to the plaintiffs.

63. In the final analysis, I find that plaintiffs have partially proved their case and I proceed to give the following orders;

I. It is hereby declared that the plaintiffs are entitled to land parcel LR 3589/51 being 2.5.acres hived off from parcel 3589/6 by way of adverse possession.

II. An order is hereby issued for the excision and registration of LR 3589/51 being 2.5 acres out of parcel 3589/6 into the name of the Plaintiffs.

III. It is hereby declared that the plaintiffs claim of entitlement to land parcel 3589/53 by way of adverse possession is unmerited and the same is hereby dismissed.

Iv Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ms. Mwangi for Plaintiff

Marube for Defendants

Court Assistant - Nancy Mwangi