



Nyamok v Omusi (Sued as the Administrator of the Estate of Plista Adera Damo- Deceased) ((Sued as the Administrator of the Estate of Plista Adera Damo- Deceased)) (Enviromental and Land Originating Summons E003 of 2021) [2024] KEELC 14210 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 14210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2021
GMA ONGONDO, J
NOVEMBER 20, 2024**

BETWEEN

JOICE ANYANGO NYAMOK PLAINTIFF

AND

JAMES AGWENGE OMUSI DEFENDANT

(SUED AS THE ADMINISTRATOR OF THE ESTATE OF PLISTA ADERA DAMO- DECEASED)

JUDGMENT

1. On 25th January 2021, the plaintiff who is represented by Kerario Marwa and Company Advocates, initiated the instant suit by way of an undated Originating Summons, pursuant to Section 38 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. She is seeking the orders infra:
 - a. That this Honourable Court does declare that the plaintiff Joice Anyango Nyamok together with her whole family being the house of James Nyamok (Deceased) has acquired Adverse Possession of all that land known as Kanyamkago/ Kajulu/738 measuring 13 acres (the suit land herein) having been in occupation and uninterrupted possession of the said portion for over 12 years that is to say from the year 28th April 1975.
 - b. That this Honourable court be pleased to order that the plaintiff be registered as the sole proprietor of the suit land.
 - c. That this Honourable Court does issue a permanent injunction restraining the respondent by himself or his agents from interfering with the applicant's occupation and enjoyment of the said 13 acres.



- d. Any other relief this Honourable court may deem fit to grant in the circumstances.
2. The originating summons is anchored on grounds (a) to (c) inter alia:
 - a. That the plaintiff has been in uninterrupted occupation of the suit land for over 12 years.
 - b. That the said occupation by the plaintiff has been open and known to the defendant.
 - c. That the defendant, his late mother Plista Adera, have a larger parcel of land which is their ancestral land at Rapogi.
 3. The claim is further founded on a fourteen (14) paragraphed supporting affidavit of the plaintiff and a copy of certificate of official search (JAN I) as well as a copy of death certificate (JAN II) annexed to the affidavit. The plaintiff deposed, inter alia, that together with the defendant's mother, Plista Adera Damo (deceased 1), they are the registered proprietors of the suit land, each holding $\frac{1}{2}$ share thereof. That deceased 1 erroneously got registered as a proprietor yet she was not related to the plaintiff or her husband. That deceased 1 together with her husband, one Wilson Orinyo (deceased 2), briefly lived on the suit land before she left for deceased 2's home in Rapogi. That deceased 1 eventually passed on and was buried alongside deceased 2 in Rapogi.
 4. Also, the plaintiff stated that deceased 1 never cultivated and/or put up any structures on the suit land. That she has been in open and uninterrupted possession and use of the entire suit land since 1975 to date.
 5. By a Power of Attorney dated 15th June 2022, the plaintiff authorized Michael Dibogo Onyango, to prosecute the suit on her behalf.
 6. PW1, Michael Dibogo Oyango, the plaintiff's eldest son and holder of her Power of Attorney, relied on the plaintiff's statement and her documents, to wit, a copy of a certificate of official search in respect to the suit land and a copy of the death certificate for deceased 1 (PEXhibits 1 and 2). On cross-examination, he stated that the search certificate indicates that the suit land belongs to both the plaintiff and deceased 1, who were registered as the first registered owners on 28th April 1975 with each holding $\frac{1}{2}$ share of the same.
 7. PW2, Dominicus Aludo, relied on his statement on record which was adopted as part of his evidence. He averred that he did not know deceased 1 herein.
 8. PW3, William Okinyi Omusi, relied on his statement on record which was adopted as part of his evidence. He testified that his grandfather known as Omollo, gave the suit land to Janes Onyango Nyambok, the late husband to the plaintiff (deceased 3 herein). That deceased 3 died in 1968 and is buried thereon. Upon cross-examination, he affirmed that the plaintiff lives on the suit land.
 9. James Omollo Ojwang' (PW4) relied on his statement on record which was adopted as part of his evidence. Under cross-examination, he stated that the plaintiff buried deceased 3 on the suit land.
 10. By the submissions dated 1st February 2024, the plaintiff's counsel identified five issues for determination inter alia:
 - a. Whether a claim for adverse possession can arise from the suit land herein?
 - b. Whether the plaintiff has met the threshold for grant of orders of adverse possession.
 - c. Whether the plaintiff is entitled to be registered as the sole proprietor of the entire suit land.



- d. Whether a permanent injunction restraining the defendant by himself or his agents from interfering with the plaintiff's occupation and enjoyment of the suit land should be issued.
 - e. Who should bear the costs of the suit.
11. Learned Counsel submitted that the plaintiff is in occupation of the entire suit land and her claim is for the half share of the suit land which is registered in the name of the defendant herein. That the plaintiff's occupation of the defendant's portion has been open, without secrecy and with the intention of acquiring ownership. That the plaintiff has proved her claim to the requisite standard and is entitled to the orders sought herein. Reliance was placed on various authorities, including the case of Mbira vs Gachuhi (2002) 1 EALR 137, among others, to buttress the submissions.
 12. The defendant through Mudeyi Okumu and Company Advocates, opposed the claim vide a replying affidavit sworn on 5th May 2021. He deposed in part that he presently co-owns the suit land with the plaintiff, ownership having been transmitted to him upon obtaining a grant of letters of administration to the estate of deceased 1 in Migori CMCC Succession Cause No. 28 of 2020. That since the Plaintiff is a joint owner of the suit land, she has not been adversely occupying the same so as to acquire it by way of adverse possession. That therefore, the prayers sought herein are untenable.
 13. DW1, James Agwenge Omusi, relied on his statement dated 25th March 2022 as well as his list of documents on record which were marked as PExhibits 1, 2 and 3. He testified that the plaintiff is his grandmother. That he is also the grandson to deceased 1 and has obtained letters of administration in respect to her estate. That the suit land is ancestral hence, the plaintiff is not entitled to the whole of it. That there was no fraud in registration of the same in the names of the parties herein. That both parties utilize the suit land.
 14. Under cross-examination, DW1 conceded that he does not live on the suit land. That he has been utilizing the same since 2020. That his father is alive but does not have a home on the suit land and has never used the same.
 15. DW2, Dominic Omusi Damo, relied on his statement on record, which was adopted as part of his evidence. He confirmed that the suit land is registered in the names of the parties herein. That the suit land has not been subdivided. That he does not utilize the suit land as he left it for the plaintiff herein. During cross-examination, he admitted that it is the plaintiff herein who utilizes the suit land.
 16. The defendant's counsel filed submissions dated 21st October 2024 and submitted that a claim for erroneous registration can only be borne out of either a mistake or fraud. That there was no objection to the first registration and the defendant has been utilizing the suit land and has planted trees thereon. That in any event, such a claim is time barred, ought not to be instituted by way of originating summons and should be directed to the Attorney General and/or the Commissioner for Lands for resolution. That in the instant case, the plaintiff has not tendered proof in regard to the purported erroneous registration. That the indefeasibility and conclusiveness of title under the torrens system is rebuttable only by proof of fraud or misrepresentation, in which a party is involved.
 17. That further, a claim for adverse possession is untenable in the circumstances since the plaintiff herein is a joint owner of the suit land. Thus, counsel urged the court to dismiss the suit with costs. To fortify the submissions, learned counsel relied on various authoritative pronouncements, including the case of Joseph N arap Ng'ok v Mojjo ole Keiwua and 4 others (1997) JELR 100612 (CA).
 18. I have considered the parties' respective pleadings, evidence and written submissions. From the foregoing, the issues for determination herein are:



- a. Whether the plaintiffs have proved their case to warrant grant of the orders sought in this suit; and
 - b. Who should bear the costs of this suit?
19. The Court of Appeal in the case of Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another (2015) eKLR, held that adverse possession dictates thus;
- a. The parcel of land in dispute must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
20. Furthermore, the applicant must show that such possession was without the permission of the owner; see Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi (2020) eKLR.
21. It is important to note that the plaintiff's claim is for the entire suit land measuring approximately thirteen hectares (13 Ha) in area.
22. So, the plaintiffs' claim is over a definite portion of land as held in Muthuita –vs- Wanoe & 2 others (2008) 1KLR (G&F) 1024.
23. In the first instance, the suit land is registered in the name of the plaintiff and deceased 1 herein. Each of the proprietors holds half share thereof with effect from 28th April 1975. This is evidenced by a copy of the official search certificate dated 13th February 2020 captured in both the plaintiffs' and the defendant's list of documents forming part of their evidence herein.
24. On that score, it is evident that the plaintiff has failed to establish that her possession of the suit land was adverse to the rights of the defendant herein, since she is entitled to use and occupation of the same by virtue of ownership of a half share thereof.
25. Therefore, it is the finding of this court that a claim for adverse possession is untenable in the circumstances.
26. As regards fraud, I subscribe to the Court of Appeal decision in Kinyanjui Kamau vs George Kamau [2015] eKLR where the court expressed itself as follows;
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved...”
27. Clearly, the existence of fraud cannot be inferred from the facts; see Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR.
28. In the present case, I note that the plaintiff did not adduce sufficient evidence as proof of fraud on the part of the defendant.
29. Besides, the allegation that registration of the title to the suit land in the name of both the parties herein was occasioned by a mistake, was not supported by evidence.
30. In the circumstances, I subscribe to the Court of Appeal decision in Kirugi and another –vs- Kabiya and 3 others (1987) KLR 347, where it was held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard by way of formal proof.



31. To that end, I hold that the plaintiff has not proved the ingredients of adverse possession to the requisite standard as held in the case of Wilson Kazungu Katana (supra). So, her claim must fail.
32. Accordingly, the instant suit is hereby dismissed with costs to the defendant.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF NOVEMBER 2024.

G.M.A ONG'ONDO

JUDGE

Present;

Kisia instructed by Mwita Kerario learned counsel for the plaintiff

Mudeyi Okumu learned counsel for the defendant

To Maurice, court assistant

