



Okerio (Suing as Administrator of the Estate of Albert Okerio Ochengé - Deceased) v Okeno & 2 others (Environmental and Land Originating Summons 29 of 2017) [2024] KEELC 14229 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 14229 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 29 OF 2017

GMA ONGONDO, J

NOVEMBER 20, 2024

IN THE MATTER OF SECTION 3 OF THE LIMITATION OF ACTION OF KENYA

2010

AND

IN THE MATTER OF LAND PARCEL, NO: SUNA WEST/WASWETA 11/536

AND

IN THE MATTER OF LAND PARCEL, NO: SUNA WEST /WASWETA 11/3542

AND

IN THE MATTER OF LAND PARCEL, NO: SUNA WEST/ WASWETA 11/3947

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

RICHARD ORANGO OKERIO PLAINTIFF

SUING AS ADMINISTRATOR OF THE ESTATE OF ALBERT OKERIO

OCHENGE - DECEASED

AND

SILVANUS OGANYO OKENO 1ST DEFENDANT

DAVIS WAFULA BARAZA 2ND DEFENDANT

CAROLINE MULEE NDAMBUKI 3RD DEFENDANT



JUDGMENT

1. By an originating summons dated 24th March 2016 and amended on 13th July 2023 generated under, inter alia, Order 37 Rules 1 and 2 of the *Civil Procedure Rules 2010*, the plaintiff through Kerario Marwa and Company Advocates sued the defendants for orders;
 - a. That the plaintiff be granted an order of Permanent Injunction restraining the Defendants either by themselves or agents and/or servants and/or anyone claiming under the said Defendant from entering upon trespassing onto, taking possession, cultivating, building and or in any way whatsoever interfering with the plaintiff's right over the suit land, that is Land Parcel Numbers. Suna West /wasweta II/3542 & 3947 (The 1st and 2nd subdivisions of the suit land herein) respectively.
 - b. That this Honourable Court be pleased to issue a Prohibitory Order to preserve and/or conserve the two sub divisions of the suit land from being alienated, encumbered and/or wasted whatsoever.
 - c. That the plaintiff Albert Okerio Ochenge be declared entitled by adverse possession to a portion of that piece of land containing 8.0 acres or thereabout registered in the land title registry as regards the 1st and 2nd sub divisions of the suit land.
 - d. That the title issued to the Defendants be cancelled and/or revoked and the plaintiff be registered as the owner of the said portion of land measuring 8.0 Acres or thereabout.
 - e. That a declaration that the registration and subsequent subdivision and transfer of the original Land Parcel No. Suna West/Wasweta II /536 (hereinafter referred as the suit land) be declared null and void.
 - f. That a declaration that the plaintiff has acquired adverse possession of the suit land measuring 34.0 Ha (hereinafter referred as the suit land) and the plaintiff be entitled to share land.
 - g. That such further and/or other orders be made as the court may deem fit and expedient.
 - h. That cost of this application be borne by the Respondent.
2. The originating summons is anchored upon the plaintiff's affidavit sworn on 2nd October 2023 and the accompanying documents marked as 'AOO1 to AOO7' which include; sale of land agreement (AOO2), certificates of official search (AOO 3 A & B), photographs showing house and cultivation (AOO4 & 5) pertaining to the suit land. The plaintiff asserted, inter alia, that he has been in actual, open, continuous and peaceful occupation of the suit land in excess of twelve years. That the defendants have been dispossessed thereby hence, the present suit.
3. The defendants filed their replying affidavits both evenly sworn on 25th April 2016 and denied the plaintiff's allegations in the amended originating summons. They stated in part that the plaintiff was not in possession or occupation of the suit parcels of land.
4. On 8th November 2016 the court gave directions on the hearing of the suit. The parties' respective pleadings namely the amended originating summons and replying affidavits were converted to a plaint and statements of defence respectively. That the suit be heard by way of viva voce evidence.
5. Notably, the present plaintiff substituted the original plaintiff, Albert Okerio (Deceased) pursuant to amendment of pleadings with leave of the court on 3rd July 2023.



6. PW1, Richard Orango Okerio the present plaintiff testified that he was a son and the administrator of the estate of the Deceased and relied on his statement dated 3rd November 2022 and list of documents dated 1st November 2022 (PExhibits 1 to 14) as part of his evidence in chief. He stated that the deceased bought the suit land from Gabriel Abich Keke and Wilfrida Omondi Keke. That he has resided on the suit land for 40 years continuously and peacefully, among other things.
7. Under cross examination, PW1 stated that there was case number 562 at Kisii between the deceased and the 2nd and 3rd defendants over the planting of trees thereon by the deceased. That a surveyor's report and photos show that he lives on the suit land and claims 8 acres thereof.
8. PW2, Joel Onkoba Mokuia relied on his statement dated 1st November 2022 as part of his testimony and stated that he was present in 1980 when the deceased bought the suit land from Gabriel Abok and Winfrida Geke. That the deceased built a house and lived peacefully on it as well as planted trees and maize thereon.
9. During cross examination, PW2 told the court that he witnessed sale of the suit land in 1980. That photographs show house built by the deceased who lived thereon until his death.
10. PW3, Haron Okemwa Okongo referred to his statement dated 30th November 2018 and that the plaintiff was known to him for a long period of time purchase of the suit land in 1980. That the plaintiff, developed, practices agriculture and lives on the same.
11. In cross examination, PW1 maintained that the plaintiff purchased the suit land in 1980. That the photographs reveal the house where the plaintiff lived.
12. The 2nd defendant (DW1) testified for and on behalf of the other defendants and himself by relying on the replying affidavit filed on 26th April 2016. He stated that the suit land which he acquired in 2013, is registered in his name. That later, he sued the plaintiff and others for trespass into the suit land in Kisii High Court Case No. 562 of 2015. That he planted trees thereon. That thus, the plaintiff's occupation of the suit land is not peaceful.
13. During cross examination, DW1 stated that there was no judgment in the case he filed at Kisii High Court. That he has a structure on the suit land but does not live thereon. That the plaintiffs were not on the land at the time he purchased and forcefully into the suit land.
14. The plaintiff's counsel filed submissions dated 8th March 2024 setting out the parties' respective pleadings, evidence and stated that adverse possession has been anchored upon Articles 40 and 64 of the *Constitution of Kenya 2010*, sections 7, 13, 16, 17 and 38 of the *Limitation of Actions Act* Chapter 21 Laws of Kenya. Counsel cited, *inter alia*, *Kasuve v Mwaani Investments Ltd & 4 others* (2004) 1 KLR 184 and submitted that the plaintiff has proved the elements of adverse possession against the defendants hence, he be granted the orders on the face of the submissions.
15. In the 'submissions dated 30th October 2024, learned counsel for the defendants submitted, *inter alia*, that the 1st and 2nd defendants are the registered owners of the 1st sub division of the suit land which they bought in the year 2014 and it is a product of sub division of Land Reference Number Suna West/Wasweta II/3398 which is a sub division of land refence number Suna West/Wasweta II/2989. That the deceased original plaintiff bought a portion of the suit land measuring 8 acres from one of the common registered owners in 1980 at Kshs 9,000/- That the plaintiff trespassed into the 1st suit parcel of land as evidenced by Kisii ELC Case No. 562 OF 2015. That thus, there has never been peace between the plaintiff and the defendants. That the plaintiff admitted that the structure as shown in the photographs was built on the suit land recently.



16. Counsel delineated issues for determination including whether the plaintiff has met the threshold for grant of orders for adverse possession and whether the plaintiff is entitled to 8 acres comprised in title numbers 1st and 2nd suit sub divisions of the suit land. In discussing the issues in favour of the defendants, counsel stated that there was lack of a surveyor's report to prove actual possession of the suit land as alleged by him. To buttress the submissions, counsel cited authorities inclusive of [*Mtana Lewa v Kabindi Ngala Mwangadi*](#) (2015) eKLR and [*Steven Mwangi Gatuge v Edwin Onesmus Wanjau*](#) (2022) eKLR.
17. In the foregone, I take into account the statement of agreed issues for the plaintiff dated 30th November 2018. Also, this court is aware of Order 15 of the [*Civil Procedure Rules 2010*](#) on frame of issues for determination in a suit.
18. So, the issues for determination in this suit are summarized to whether the plaintiff has proved the ingredients of adverse possession against the defendants to warrant the orders sought in the originating summons.
19. It is settled law that in an adverse possession claim, the applicant must offer evidence to prove on a balance of probabilities that he/she had entered upon the subject land openly, peaceful, without the permission of the owner and had continued in that possession for an uninterrupted period of at least 12 years thereby dispossessing the owner and extinguished his right and title thereto; see [*Kasuve*](#) and [*Mtana Lewa*](#) cases (both *supra*) as well as [*Wambugu v Njuguna*](#) (1983) KLR 172, [*Kasuve, Titus Ong'ang' a Nyachieo v Martin Okioma Nyauma & 3 others*](#) (2015) KLR and [*Elijah O. L. Opar v Tobias Odbiambo Abach*](#) (2019) KLR.
20. Moreover, the applicant must show that such possession was without the permission of the owner; see [*Richard Wefwafwa Songoi v Ben Munyitwa Songoi*](#) (2020) eKLR.
21. It is important to note that the plaintiff's claim is for the eight acres in area. Therefore, the plaintiffs' claim is over definite portions of land as held in [*Muthuita v Wanoe & 2 others*](#) (2008) 1KLR (G&F) 1024.
22. It not in dispute that the suit land is not registered in the name of the plaintiff. The registration of the 1st and 2nd sub divisions of the suit land is in the name of DW1, among others.
23. On possession, it is established law that the same can take forms of fencing or cultivation; see [*Titus Onganga Nyachieo case*](#) (*supra*).
24. PW1 testified that he has lived on the suit land for 40 years. He relied on photographs and survey report in support of his allegation.
25. The testimony of PW1 was fortified by PW2 who stated that PW1 built a house on the suit land. That PW1 planted trees and maize thereon.
26. According to PW3, the suit land is under cultivation by PW1. Thus, this piece of evidence is in support of the evidence PW1 as regards possession of the suit land.
27. Nonetheless, PW1 stated that Kisii ELC Case No. 562 of 2015 existed between the deceased and 2nd and 3rd defendants. DW1 affirmed that in the said suit, he sued the plaintiff and others.
28. On 8th March 2018 Ms Apondi instructed by Mr Kisera learned counsel for the defendant informed the court that this suit relates to Kisii ELC Case No. 562 and sought time to consolidate them. Mr Jura instructed by Mr Nyagesoa learned counsel for the plaintiff had no objection to the request.



29. The intended consolidation of the two suits is also contained in the proceedings of 15TH May 2018 and 26th June 2018.
30. So, there has been no peaceful and continuous possession of the suit land by PW1 in light of the existence of Kisii ELC Case No. 562 of 2015.
31. Further, the letter (A006) to the supporting affidavit by Assistant Commissioner as well as another letter (A007) to the said affidavit, buttress the contention of DW1 that there has been interruption of possession of the suit land by PW1. The occupation has not been peaceful.
32. It is therefore, the finding of this court that the plaintiff has not satisfied all the ingredients of adverse possession against the defendants. The plaintiff's claim has not been proved on a balance of probability.
33. A fortiori, this suit be and is hereby dismissed with costs to the defendants.
34. It is so ordered.

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

G M A ONGONDO

JUDGE

Mr Kerario Marwa learned counsel for the plaintiff

Mr Muniko instructed by for Kisera learned counsel for the defendants

Tom Maurice, court assistant

