



**Ombe & another (Suing as administrators of the Estate of Henry Ombe Abur)
v Sule (Environmental and Land Originating Summons E007 & E008 of 2023
(Consolidated)) [2024] KEELC 7473 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING
SUMMONS E007 & E008 OF 2023 (CONSOLIDATED)**

E ASATI, J

NOVEMBER 7, 2024

BETWEEN

**MARGARET O OMBE & GILBERT O ABUR (SUING AS ADMINISTRATORS
OF THE ESTATE OF HENRY OMBE ABUR) PLAINTIFF**

AND

JARED NYAGWETH SULE DEFENDANT

JUDGMENT

Introduction

1. Vide court order made on 24th October, 2023, Kisumu EL Case No. E008 of 2023(O.S) and NO. E007 OF 2023(O.S) were consolidated. KISUMU EL CASE NO. E007 (O.S) became the lead file.
2. In Kisumu ELC CASE NO. E008 OF 2023, Gilbert O. Abur, Alice Juma Abur and Addah Ajwang Abur in their capacity as Administrators of the estate of one Stephen Abur Ombe, deceased, sued Jared Nyagweth Sule in his capacity as Administrator of the estate of Richard Sule Awili, deceased. The subject matter of the suit is a parcel of land known as Kisumu / Kasule/3483 which the Plaintiffs claim to have acquired title to by adverse possession.
3. The case of the plaintiffs is that in the year 1980 the deceased and one Henry Ombe Abur bought land from Richard Sule Awili, also now deceased. That the purchased property was part of land parcel NO. Kisumu / Kasule/3252.
4. That upon purchase, their family settled on the suit lands and Gilbert Abur and his two siblings were each allocated their shares by their father.



5. That land parcel NO. Kisumu / Kasule/ 3252 was sub-divided in the year 1996 to produce parcel numbers 3479, 3480,3481, 3482 and 3483.
6. That despite taking possession of Kisumu / Kasule/3482 and 3483, the 1st plaintiff did not get title to the said parcel of land. That the parcels remained in the name of Richard Sule Awili who had sold the land to the plaintiffs' father.
7. That the plaintiffs' father, the deceased, had taken possession of the land in the year 1985, planted trees and constructed Henry's house in the same year. That Henry later constructed another house which is still on the land to date.
8. That the plaintiffs have had peaceful occupation of the suit land, planted trees, built houses and used the land for their well-being. That the Defendant's title over the suit land has expired by effluxion of time.
9. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the 1st plaintiff on 8th March, 2023.
10. In KISUMU ELC CASE NO. E007 OF 2023(O.S) Margaret Ombe and Gilbert O. Abur in their capacity as the Administrators of the Estate of Henry Ombe Abur sued the same Defendant. The subject matter is land parcel known as Kisumu / Kasule/3482. The case of the 1st plaintiff is that she was the widow of the deceased, Henry Ombe Abur. That she had lived on the suit property since she got married to the deceased and acquired title by adverse possession.
11. Both suits were commenced by Originating Summons dated 8th March, 2023 seeking for similar prayers.
12. In response to the Originating Summons, the Defendant filed a Replying Affidavit on 24th March 2023 denying the plaintiffs' claim.
13. After consolidation, the matters were heard by way of viva voce evidence pursuant to directions taken on 27th April, 2023.

The Evidence

14. PW1 was Gilbert Odhiambo Abur. He adopted the contents of his Affidavit sworn on 8th March, 2023 as his evidence in chief. He stated that his late brother Henry Abur started occupying land parcel NO. Kisumu / Kasule/3482 in the year 1986 till 2008 when he died. That the Defendant has never occupied the land and there has never been a dispute on ownership.
15. On cross-examination, he stated that the widow of Henry lives in Nyakach. That parcel No. Kisumu / Kasule/3483 belongs to him. That he had filed an earlier suit over the suit lands which he withdrew because he found that the evidence he had then was not sufficient.
16. PW2 was Joseph Ouma Abur. He stated that he has a home on land parcel NO. Kisumu / Kasule/3481. He had stated in his witness statement dated 17th May, 2023 that his late father by the name of Stephen Abur purchased land parcel number Kisumu / Kasule/3252 from Richard Sule Awili. That his elder brother one Henry immediately constructed a house on a portion of the said parcel where he stayed with his wife Margaret from the year 1982. That the land was initially sub-divided into two portions to be shared between Henry and Gilbert and so when Henry built a house on one portion, the other portion was left for Gilbert.



17. That Henry had constructed his first house on what is now Kisumu / Kasule/3481. That in 1995, their father caused the land to be subdivided into 3 portions because he (PW2) was to get a share as well.
18. That he was therefore obligated to construct a house for Henry on parcel No. Kisumu / Kasule/3482. That he remained on parcel NO. Kisumu / Kasule/3481 as Henry moved to NO. Kisumu / Kasule/3482.
19. That it was the Defendant's father who facilitated transfer of the land parcel No Kisumu / Kasule/3481 into his (PW2's) name. That the transfer was done at the same time with the one for James Omondi Waga who was his colleague at Kenya Posts and Telecommunication Ltd. That James's parcel was No. Kisumu / Kasule/3480.
20. He testified further that the Plaintiffs have been in continuous uninterrupted occupation of the suit parcels of land for over 20 years.
21. On cross-examination, PW2 stated that Henry bought a portion of land parcel number Kisumu / Kasule/3252 and that the portion Henry bought and built his house on is what became number Kisumu / Kasule/3481. That before he died, the Defendant's father requested to transfer the sold land. That only one consent was obtained to cover all the 3 parcels of land. That the entire land was sub-divided into 5 portions so that Henry got No. Kisumu / Kasule/3482, PW2 got Kisumu / Kasule/3481, Gilbert got Kisumu / Kasule/3483 and that NO. Kisumu / Kasule/3480 was given to someone else.
22. PW3 was James Omondi Waga. He adopted the contents of his witness statement where he had stated that he is the registered owner of land parcel No. Kisumu / Kasule/3480 and that he was a neighbour to the Plaintiffs. That Sule Awili transferred the land to him and also transferred to Joseph his portion.
23. PW4 was Isaac Sabulei who produced forestry report. He stated that his assignment was to assess the age of the trees on the lands. That the trees were over 30 years old. On cross-examination, he stated that his findings were that some of the trees were planted while others grew on their own and that he could not confirm who planted the trees.
24. PW5 was Peter Mboga Waombo. He adopted the contents of his witness statements dated 17th May, 2023. He testified that he accompanied the Surveyor and was present during the sub-division of land parcel Number Kisumu / Kasule/3252 into Numbers 3479, 3480, 3481, 3482 and 3483. That the mutation was signed by Richard Sule Awili. That thereafter they proceeded back to the survey office, registered the five parcels and amended the map accordingly. That the survey was done in full knowledge of Richard Sule Awili, deceased. On cross-examination, he stated that he used to work in the survey office at Kisumu till the year 2007.
25. PW6 was Margaret Opondo Ombe. She adopted the contents of her Affidavit sworn on 8th March, 2023 as her evidence in chief. She stated in the Affidavit that she was the widow of Henry Ombe Abur, deceased. That her late husband and his father by the name of Stephen Abur, deceased bought a parcel of land from Richard Sule Awili. That the land was paid for by instalment, the last one of which was paid in the year 1982. That upon her marriage to Henry, they moved to the suit property. That their late father constructed a house on what is now Joseph's property number Kisumu / Kasule/3481. That Stephen Abur Ombe subdivided the property into 3 portions now known as Kisumu / Kasule/3481, 3482 and 3483. That Joseph was given No.3481 while Henry was given 3482.
26. That later, they constructed their first house on parcel number Kisumu / Kasule/3482, a house she lives in to date. That parcel number Kisumu / Kasule/3483 was given to her brother in law by the name



- Gilbert. That they have been in peaceful possession of the properties and that the Defendant has all the time been aware of their open and peaceful occupation and possession of both parcels of suit land.
27. That the orders sought will not prejudice the Defendant in any way as he has not been depending on the land. On cross-examination, PW6 stated that her father in law did not reside on the suit land. That when her husband died in the year 2008, he was buried at a place called Nyakach. That she stays at Nyakach but visits the suit land to collect rent. That it is her husband who bought the land that Joseph has which is parcel number Kisumu / Kasule/3481.
 28. On behalf of the defence, the Defendant testified as DW1. He adopted the contents of the witness statement dated 22nd July, 2023 as his evidence in chief. He had stated in the witness statement that both suit lands are registered in the name of Richard Sule Awili, deceased who passed away on 5/7/1997. That the suit lands were never sold to Stephen Abur Ombe. That Stephen Abur Ombe never occupied the suit lands. That the suit lands had never been utilized for a long time save for the trees planted by his siblings and others that grew on their own.
 29. He stated further that Gilbert Abur took possession of the suit lands in the year 2013 and proceeded to construct some temporary structures. That as a family they protested hence Gilbert filed a case namely; KISUMU ELC CASE NO 29 OF 2018 (O. S). That it was not true that the plaintiffs had planted trees on the land or had had possession of the land for more than 12 years.
 30. DW1 produced certificates of official search for parcel number Kisumu / Kasule/3482 and 3483, certificate of death for Richard Sule Awili, Originating Summons and Replying Affidavit in case No. KISUMU ELC O.S. NO.29 OF 2018, Ruling delivered in No.29 of 2018 and Survey Report on parcel numbers Kisumu / Kasule/3482 and 3483.
 31. On cross-examination, DW1 stated that the temporary structures on the suit lands were built in the year 2013, that he protested when the temporary structures were being built and that Henry Ombe lived on his father's land and not on the suit lands.
 32. DW2 was Angeline Anyango Kungu. She relied on her witness statement dated 22nd July, 2023.
 33. DW3 was Meshack Ogelo. He also relied on the contents of his witness statement. He stated that by 2013 when he went home to vote, there were no structures on the suit land. That the structures currently on the suit land were constructed toward the end of the year 2013.

Submissions

34. At the end of the evidence, parties filed written submission on the case. It was submitted on behalf of the plaintiffs that it is not in dispute that the plaintiffs are in possession of the suit property. That the plaintiffs produced a land sale agreement dated 13th October 1980 to guide the court as to when the initial contact over the suit property took place. That the father of the Defendant facilitated the transfer process of one of the parcels of land namely; L.R No. Kisumu / Kasule/3481 in favour of Joseph Ouma Abur. That after Joseph took his portion the two brothers; Henry Ombe Abur and Gilbert Odhiambo Abur remained in their portions.
35. That from the evidence, Henry Ombe Abur took possession of the property immediately after purchase. Relying on the case of Cathy Alucia Jebur Kiplagat -vs- Vincent Komen Krelnut (2018) eKLR, Counsel submitted that adverse possession can be claimed where the registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land. Counsel also relied on the case of Peter Mbiru Michuki -vs- Samwel Mugo Michuki (2014) eKLR to submit 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.



36. That since the last payment of the purchase price was in 1982, failure of the plaintiffs to enforce the agreement put them in the property adversely. That the Defendant's father signed the mutation form in 1996 for sub-division of the land.
37. Counsel submitted further that the plaintiffs had had quiet and uninterrupted possession of the suit land. That the defendant did not take any action to assert his rights.
38. Concerning developments done on the land, Counsel submitted that there were trees planted on the land as confirmed by PW4. That there are houses and a nursery school.
39. Relying on the case of *Chevron (K) Ltd -vs- Harrison Charo Wa Shutu* (2016) eKLR where the court while quoting its decision in *Mweu -vs- Kiu Ranching and Farming Co-operative Society Ltd* (1985) KLR 430 Counsel submitted that by 1996 when the initial land was sub-divided, the defendant had already lost ownership of the parcels. Counsel prayed that the plaintiffs' claims be allowed with costs.
40. On behalf of the defendant it was submitted that the plaintiffs' claim was time barred. Counsel relied on the provisions of sections 7, 9 and 16 of the *Limitation of Actions Act* and submitted that the claims ought to have been filed within 12 years of the death of Henry Ombe Abur, the deceased, through whom the plaintiffs in ELC No. E007/2023 claims land parcel number KISUMU/KABULI/3482. That since Henry Ombe Abur died on 13/10/2008 a suit to recover his land ought to have been filed within 12 years from the date of his death. That the present case was filed after 16 years. Counsel relied on the case of *Mahta -vs- Shah* (1965) E.A 321 and *Gathoni Vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 to support the submissions.
41. Counsel submitted further that a party claiming under the doctrine of adverse possession must establish laid down ingredients of adverse possession. Relying on the cases of *Gabriel Mbui -vs- Mukinda Maranya* (1983) eKLR and *Mtana Lewa -vs- Kahindi Ngala Mwangandi* (2015) eKLR where the ingredients of adverse possession were discussed, Counsel submitted that the plaintiffs had not met the threshold.
42. Counsel submitted further that the two deceased persons namely; Stephen Abur Ombe and Henry Ombe (Abur) never lived or occupied the suit land. That if Stephen Abur Ombe never lived on the land, the plaintiffs cannot claim through him as plaintiff in case No. E008 of 2013 in respect of parcel number Kisumu / Kasule/3483. That it is agreed that the plaintiffs built a house on parcel number 3481. That Gilbert Abur did not prove where he built his house. That while the plaintiffs alleged that Henry Ombe Abur was killed and died in the house on land parcel number 3482, the Certificate of death they produced showed that he died of Malaria in Nyando and not on the suit land. That no tenancy agreement was produced to show that PW6 had tenants on the suit land.
43. That the defendant produced a survey report that showed the temporary structure on the land.
44. Counsel relied on the case of *Jandu vs Kaplal & another* (1975) EA 225 where it was held that to prove title by adverse possession it is not sufficient to show that some acts of adverse possession took place. That adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner.
45. That nothing was produced in court to show that the defendant was the personal representative of the deceased, Richard Sule Awiti.

Counsel prayed that the suit be dismissed with costs.



Issues for Determination

46. The substantive issue for determination is whether or not the Plaintiffs have acquired title to the suit lands by adverse possession. The questions that the court will determine is whether or not the Plaintiffs entry and presence on the suit lands were non-permissive and non-consensual, whether or not the Plaintiffs have had continuous, open, exclusive and uninterrupted peaceful occupation of the suit lands for the requisite period and whether or not the Defendants/deceased's title to the suit land has become extinguished by effluxion of time.

Analysis and determination

47. The Plaintiffs claim that their entry onto the suit lands was on the strength of the land sale agreement. That their father and one Henry Ombe purchased the suit lands which was subsequently sub-divided and shared out to them and hence they entered onto their respective portions and have remained thereon to date. The Plaintiffs in both cases relied on the same land sale agreement dated 13th October, 1980. The agreement does not indicate the parcel number of the land being sold but both parties were in agreement that it was in respect of land parcel number Kisumu / Kasule/3252 belonging to Richard Sule Awili. The agreement showed that the sold portion measured 70 x 94 x 25 x 116 feet (herein called the purchased portion) and that the purchase price was KShs.4000/-. The seller was Richard Sule Awili and the purchaser Henry Ombe Abur. No other agreement was exhibited.
48. The copies of register (green cards) produced show that the suit land parcel number Kisumu / Kasule/3482 and 3483 were resultant parcels after sub-division of the mother land parcel number Kisumu / Kasule/3252 as was land parcel number 3281 which is registered in the name of Joseph Abur (PW2).
49. It was the Plaintiffs' case that the purchased portion was sub-divided into 3 portions to create number Kisumu / Kasule/3481, 3482 and 3483. However, this is not possible because the total size of the suit lands and parcel No. 3481 put together exceeds the size of the purchased portion by far. While the purchased portion only measured 70 by 94 by 25 by 116 feet, perusal of the green cards produced as exhibits show that land parcel No. Kisumu / Kasule/3482 measures 0.06Ha, Kisumu / Kasule/3483 measures 0.04Ha while No. Kisumu / Kasule/ 3481 measures 0.08Ha, making a total of 0.18 Ha.
50. According to the Defendant, the property that the plaintiffs have a right over is Kisumu / Kasule/3481 and that that is where the permanent house is built. It was further the Defendants case that whatever portion of land his father sold, he obtained consent of the Land Control Board and transferred.
51. The plaintiffs testified that the defendant's father in his life time did obtain consent of the Land Control board and transferred land parcel number Kisumu / Kasule/3481 to PW2. Although the Plaintiffs claimed that the one consent was to cover all the three parcels, they did not explain why then the suit lands were not transferred to any of the deceased persons or the plaintiffs at the time when parcel No. 3481 was transferred to PW2. There was also no explanation as to why Henry Ombe built his house on the portion now registered as No. 3481 and not on the suit lands if indeed the suit lands were part of the purchased portion.
52. The Plaintiffs testified that Henry's house remained in place and was occupied by Henry and his wife, PW6, till 1997 when they constructed another house on parcel number Kisumu / Kasule/3482. However, the evidence of the plaintiffs' witnesses differed as to who built the said house on parcel number 3481. According to PW6, the house was built by her father-in-law, Stephen Abur, deceased but according to PW1 and PW2, it was Henry who built it.



53. There is no evidence that Stephen Abur Ombe was involved in the land sale agreement produced as exhibit. There is no evidence that he bought any portion of the mother land parcel number Kisumu / Kasule/3252 or any of the resultant parcels after subdivision. Although the plaintiffs claimed that Stephen Abur subdivided the purchased portion of land to create parcel numbers 3481, 3482 and 3483, this cannot be true or possible because he was not the registered owner of the mother title and in the account of PW5 as to how the subdivision was done and the suit lands created, Stephen Abur Ombe is not mentioned. The evidence further shows that Stephen Abur Ombe never resided on the suit land. His estate which is the plaintiff in case No E008 OF 2023 cannot therefore sustain a claim of adverse possession over the suit land.
54. Gilbert Abur who claims that parcel number 3483 belongs to him produced no evidence of his adverse possession of the land.
55. According to the Defendant, the Plaintiffs only entered the suit land in the year 2013 and put up temporary structures. The survey report and the photographs produced by the Defendant showed the temporary structures.
56. I have considered the totality of the evidence. Entry onto a parcel of land on the basis of a sale agreement of the subject land may mature into adverse possession if the agreement is repudiated and the seller fails to exert his/her title and remove the buyer from the land. Time will start running in favour of the buyer who is in occupation from the date the agreement is repudiated.
57. The Court of Appeal in Kisumu App. No 82 of 2014 Wilfred Kegonye Babu vs Henry Mose Onuko [2019] eKLR quoting from Wambugu vs Njuguna [1983]KLR 172 held that

“where the Claimant is a purchaser under a contract of sale of land.... The possession can only therefore become adverse once the contract is repudiated.”

The court further stated that

“where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The Claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”

In the same case the court observed that

“the phrase ‘adverse possession’ has a restricted legal meaning. It does not mean that every person in possession of land belonging to another for the statutory period is automatically entitled to the land by adverse possession.”

58. In the present case if the court were to believe the contention of the plaintiffs that they entered the land on the basis of a land sale agreement, there is no evidence that the sale was ever repudiated. According to the plaintiffs, even consent of the Land Consent to transfer the lands in their favour was obtained. The doctrine of adverse possession is therefore not applicable.
59. Concerning case No. E007 OF 2023, the case is brought on behalf of the estate of Henry Abur. There is no evidence that Henry Abur bought or resided on land parcel number 3482. When he died, Henry was buried at Nyakach where his widow PW6 resides. No evidence was produced to support PW6’s claim that she has a house on land parcel number 3482 or that she visits the suit land to collect rent. PW2 admitted on cross examination that the portion Henry bought and built his house on is what



became parcel number 3481. PW6 also stated that it is her husband who bought the land which Joseph has which is parcel number 3481. All this evidence show that the purchased portion is what was ultimately registered as parcel number 3481. It is instructive to not that in an earlier suit filed by PW1 namely; KISUMU ELC NO. 29 OF 2018 which was withdrawn, PW1 was claiming to have had adverse possession of both the suit lands herein. The pleadings and ruling in case No 29 OF 2018 were produced as exhibits herein.

60. I am inclined to believe the evidence of the defence that plaintiffs' entry onto the suit lands took place in the year 2013 as an act of trespass. From the year 2013 to 10th March 2023 when the suit was filed the requisite period of 12 years had not elapsed.
61. On whether or not the Defendant's title over the suit land had become extinguished, under section 17 of the Limitation of Actions Act upon expiry of the limitation period without the registered owner taking steps to assert his/her title the title of the registered owner becomes extinguished. The court has already found that the requisite period of 12 years since the time the plaintiffs trespassed onto the suit lands had not elapsed by the time the suit was filed.
62. In conclusion, this court has determined that firstly, the suit lands were not part of the purchased portion of land. Secondly, the purchased portion of land is what was registered as Kisumu / Kasule/3481 in the name of PW2. Further that there is no evidence that the Plaintiffs or Stephen Abur Ombe or Henry Ombe, both deceased, entered onto the suit lands before the year 2013. Further that entry onto the suit parcels of land by the plaintiffs in the year 2013 was an act of trespass and not pursuant to any purchase. That the plaintiffs have not had continuous, open, peaceful and uninterrupted possession of the suit lands for the requisite period of 12 years. And that the titles of the registered owner in respect of the suit lands have not become extinguished.
63. On the basis of the determinations herein, the court finds that the plaintiffs have failed to prove their respective cases on a balance of probabilities. The suits are therefore hereby dismissed. Costs to the Defendant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7TH DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi for the Plaintiff.

Kouko for Defendants.

