



**Otieno v Opot (Environment and Land Case Civil Suit 74 of 2016)
[2024] KEELC 13956 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 74 OF 2016
SO OKONG'O, J
DECEMBER 19, 2024**

BETWEEN

FREDRICK OTIENO OTIENO PLAINTIFF

AND

STEPHEN ALUOCH OPOT DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant through a plaint dated 6th April 2016 in which the Plaintiff sought the following reliefs;
 - a. Eviction of the Defendant from all that parcel of land known as Title No. North Gem/Malunga/571(hereinafter referred to as “the suit property”).
 - b. Costs of the suit.
2. The Plaintiff averred that he was the registered owner of the suit property and that on 27th December 2014, the Defendant without any right to do so forcibly entered the suit property and constructed a semi-permanent house thereon. The Plaintiff averred that despite notice served upon him to vacate the suit property, the Defendant had failed and or refused to do so and had continued with the trespass.
3. The Defendant filed a defence and a counter-claim against the Plaintiff on 15th July 2016. The Defendant averred that at all material times the suit property was registered in the names of Charles Otieno Mbongo and Ambrose Owino Mbongo both deceased as tenants in common in equal shares.
4. The Defendant averred that the title held by the Plaintiff in respect of the suit property acquired by him on 4th June 2016 was illegal and fraudulent in that the Plaintiff could only become registered as the proprietor of the suit property after undertaking succession in respect of the estates of the two deceased registered owners which he never did. The Defendant contended that as a holder of an illegal title, the Plaintiff had no locus standi to sue the Defendant.



5. The Defendant averred that he entered into the suit property in 1999 pursuant to a sale agreement that he entered into with one of the deceased owners of the suit property, Charles Otieno Mbongo to whom he paid a sum of Kshs. 30,000/- for a portion of the property that was delineated and marked on the ground. The Defendant averred that Charles Otieno Mbongo died before he subdivided the suit property and transferred the said portion of the suit property to the Defendant.
6. The Defendant averred that since the parties had not obtained the consent of the Land Control Board for the sale of the said portion of the suit property within 6 months from the date of the agreement of sale, the agreement became null and void under Section 6 of the *Land Control Act*, Chapter 302 Laws of Kenya. The Defendant averred that he had remained in uninterrupted occupation of the said portion of the suit property from the time the agreement between him and Charles Otieno Mbongo became void in December 1999 and had carried out several developments on the property. The Defendant averred that on 27th December 2014, he built his homestead on the said portion of the suit property.
7. The Defendant averred that by reason of the foregoing, he had acquired the disputed portion of the suit property by prescription having been in open and uninterrupted occupation of the same for over 12 years. The Defendant averred that the Plaintiff was registered as the owner of the suit property after he had acquired an overriding interest over the said portion of the suit property and as such the Plaintiff's right over the suit property was subordinate to that of the Defendant in respect of the portion thereof occupied by the Defendant. The Defendant averred further that if the Plaintiff was the lawful administrator of the estate of Charles Otieno Mbongo, deceased, he was obliged to perform the deceased's obligations under the agreement of sale between the deceased and the Defendant.
8. In his counter-claim, the Defendant reiterated the contents of his defence and averred that he was entitled to specific performance of the agreement of sale that he entered into with Charles Otieno Mbongo deceased. The Defendant prayed for judgment against the Plaintiff for:
 - a. An order that the title that was issued to the Plaintiff in respect of the suit property be cancelled.
 - b. An order that the circumstances leading to the issuance of the title in respect of the suit property to the Plaintiff be investigated and persons found culpable be subjected to criminal proceedings.
 - c. A declaration that the Defendant was entitled to be registered as the owner of the portion of the suit property under his occupation.
 - d. An order that the District Land Surveyor Siaya and the District Land Registrar Siaya do survey the suit property and come up with the exact boundary of the portion of the suit property under the Defendant's occupation and to register the same in the Defendant's name.
9. I have not seen on record a reply to defence and defence to the Defendant's counter-claim. The Plaintiff's suit was dismissed on 14th May 2018 for want of prosecution. That left only the Defendant's counter-claim for prosecution.
10. At the hearing of the Defendant's counter-claim, the Defendant adopted his witness statement dated 1st February 2024 as his evidence in chief and produced the documents attached to his list of documents of the same date as a bundle as D.EXH.1. He told the court that he purchased the portion of the suit property that he was occupying from the Plaintiff's father on 22nd December 1999 at Kshs. 30,000/- which he paid in full and that he had occupied the same from 1999 to the time he was giving his testimony. He stated that the Plaintiff's father became sick and died before he transferred the said portion of the suit property to him.



11. The Defendant called several witnesses. The first one was Alloyce Otieno Abuom (DW2). DW2 told the court that he was a village elder and that the Plaintiff and the Defendant were known to him. He adopted his witness statement dated 1st February 2024 as his evidence in chief. In his statement, he stated that he had known the Defendant as the owner of the disputed portion of the suit property for over 22 years. He stated that Charles Otieno Mbongo deceased told him that he had sold the said portion of the suit property to the Defendant and he was present when the deceased was marking the boundary of the land that he had sold. He stated that the Defendant had undertaken several projects on the disputed property which included subsistence farming and tree planting before he built his homestead thereon.
12. The next witness was Fredrick Asuna Obor (DW3). He told the court that both parties to the suit were known to him. He stated that the Defendant had employed him. He adopted his witness statement dated 1st February 2024 as his evidence in chief. In his statement, DW3 stated that he was engaged by the Defendant as one of his farm labourers on the disputed portion of the suit property in January 2000 and that he worked on the farm for several years growing various crops. He stated that he was present when the Defendant built his homestead on the property on 27th December 2014.
13. The Defendant's last witness was Barack Odhiambo Randiki (DW4). He told the court that he knew both parties to the suit. He stated that he was working for the Defendant on the disputed portion of the suit property. He adopted his witness statement as his evidence in chief. In his statement, he stated that he had known the Defendant as the owner of the disputed portion of the suit property for over 22 years. He stated that the Defendant engaged him as one of his farm labourers on the property in January 2000. He stated that together with the other labourers they grew several crops on the land. He stated that the Defendant had been in peaceful occupation of the property since 1999.
14. After the close of evidence, the parties were directed to make closing submissions in writing. The Defendant filed submissions dated 5th March 2024. The Defendant framed 3 issues for determination namely; what was the effect of the Plaintiff's failure to file a defence to the counter-claim? Whether the Defendant had made a case for the grant of the reliefs sought in the counter-claim under the doctrine of adverse possession and/or the equitable doctrine of constructive trust and proprietary estoppel, and who should bear the costs of the counter-claim? The Defendant submitted that failure by the Plaintiff to file a defence to the counter-claim amounted to an admission of the Defendant's claim. The Defendant urged the court to enter judgment for the Defendant for the counter-claim on the admission. The Defendant submitted that nothing arising out of the Plaintiff's cross-examination of the Defendant's witnesses could remedy the Plaintiff's failure to defend the counter-claim.
15. The Defendant submitted that he was entitled to the reliefs sought under the doctrine of adverse possession having had peaceful and uninterrupted occupation of the disputed portion of the suit property from 1999. The Defendant submitted that the Plaintiff's right over the suit property was subject to his right over the disputed portion of the suit property that had accrued as at the time the Plaintiff obtained his title.
16. The Defendant submitted further that the agreement of sale dated 22nd December 1999 between the Defendant and the Plaintiff's father was valid and as such enforceable. The Defendant submitted that the Plaintiff as the administrator of the estate of his deceased father was bound to take into consideration the interest of the Defendant who was a purchaser of a portion of the suit property while distributing his estate. The Defendant submitted that the said agreement of sale entitled the Defendant to invoke and call to his aid the doctrines of resulting trust and proprietary estoppel. The Defendant urged the court to grant the reliefs sought with costs of the counter-claim.



17. The Plaintiff filed submissions in reply dated 3rd June 2024. The Plaintiff submitted that although the counter-claim was undefended, the Plaintiff rebutted the evidence adduced by the Defendant in proof of his counter-claim through cross-examination of his witnesses. The Plaintiff submitted that the Defendant had not proved his claim on a balance of probabilities. The Plaintiff submitted that in his submissions, the Defendant did not stick to the case that he had pleaded and the reliefs he sought in the counter-claim contrary to the rules of pleadings. The Plaintiff submitted that the Defendant never pleaded adverse possession and constructive trust and was not entitled to seek relief under the two doctrines. The Plaintiff submitted further that although the Defendant sought the nullification of the Plaintiff's title to the suit property, no evidential basis was laid for the relief. The Plaintiff submitted that the agreement that was purportedly entered into between the Defendant and the Plaintiff's father was not enforceable as it did not meet the conditions set in Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. The Plaintiff urged the court to dismiss the Defendant's counter-claim with costs to the Plaintiff.
18. I have considered the Defendant's counter-claim, the evidence tendered by the Defendant and the submissions by the parties. It is common ground that the Plaintiff did not file a reply to the Defendant's defence and a defence to the Defendant's counter-claim. The factual averments in the Defendant's counter-claim were therefore not rebutted. In the circumstances, the only issues arising for determination are whether the Defendant proved his claim as pleaded and whether the Defendant is entitled to the reliefs sought in the counter-claim.
19. I must say that the Defendant's defence and counter-claim were not properly drafted. The causes of action are somewhat jumbled up. The reliefs sought are contradictory and are not based on the pleaded counter-claim. It is not very clear whether the Defendant wants to enforce the agreement of sale dated 22nd December 1999 or seeks relief under adverse possession. I am of the view that the Defendant having pleaded in paragraph 10 of the defence and counter-claim that the said agreement of sale became void when the Land Control Board consent was not obtained within 6 months, the Defendant could not again seek its enforcement. It is surprising that in his submissions, the Defendant submitted boldly that the said agreement was valid and enforceable. The Defendant has also claimed in paragraph 6 of the defence and counter-claim that the title to the suit property held by the Plaintiff is illegal, fraudulent and of no legal effect and has even sought the cancellation of the same in his final prayers. How can the Defendant again seek to acquire a portion of the suit property from the holder of a fraudulent title by adverse possession?
20. That said, I find no basis for the Defendant's claim that the tile held by the Plaintiff was acquired illegally and fraudulently. No evidence was placed before the court in proof of the alleged illegality and fraud. Of the causes of action pleaded by the Defendant, I am satisfied that the Defendant proved that he had acquired a portion of the suit property measuring $\frac{3}{4}$ of an acre (approximately 0.30 of a hectare) by adverse possession. Contrary to the Plaintiff's contention that the Defendant never pleaded adverse possession, he did. The Defendant never used the word adverse possession. The Defendant however pleaded in paragraph 13 of the defence and counter-claim that he had acquired prescriptive rights in the disputed portion of the suit property having been in open and uninterrupted occupation of the same for over 12 years after the sale agreement between him and the Plaintiff's deceased father became void.
21. In *Salim v. Boyd and another* [1971] E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted



occupation of the land for 12 years or more. In *Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another* (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion)...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.”

22. As I have stated earlier in this judgment, the counter-claim was not defended in the sense that no defence was filed and no evidence was tendered by the Plaintiff. The averments in the defence and counter-claim as to the circumstances under which the Defendant entered the suit property and the developments he had undertaken from the date of such entry were not controverted. The averments that the Defendant entered into an agreement of sale with the Plaintiff's father in respect of the portion of the suit property measuring $\frac{3}{4}$ of an acre and that it was the Plaintiff's father who put the Defendant into possession of the property were not rebutted either. The averment that the Plaintiff took possession on 22nd December 1999 and had remained in possession since then was also not rebutted. It was also not rebutted that the Defendant's occupation of the disputed portion of the suit property had been open, peaceful and uninterrupted. Finally, it was not denied that the Defendant was occupying the suit property without the permission of the Plaintiff or the Plaintiff's deceased father after the agreement of sale between the Defendant and the Plaintiff's deceased father became void.
23. In the final analysis and for the foregoing reasons, I am satisfied that the Defendant has proved his adverse possession claim against the Plaintiff. I therefore enter judgment for the Defendant against the Plaintiff as follows;
- a. I declare that the Defendant has acquired a portion of all that parcel of land known as Title No. North Gem/Malunga/571(the suit property) measuring $\frac{3}{4}$ of an acre (approximately 0.30 of a hectare) by adverse possession.
 - b. The County Land Surveyor, Siaya County or the National Government Surveyor in charge of Siaya County shall survey and subdivide Title No. North Gem/Malunga/571 and shall excise therefrom the portion thereof occupied by the Defendant which shall be given a title number. The said portion shall not exceed $\frac{3}{4}$ of an acre (0.30 of a hectare).
 - c. The Plaintiff shall transfer the said portion of the suit property to the Defendant within 30 days of successful subdivision of the suit property in default of which the Deputy Registrar of this court is authorised to execute all documents necessary to effect the transfer of the same to the Defendant.
 - d. The Defendant shall pay all fees and other statutory charges required for the subdivision and transfer of the said portion of the suit property from the Plaintiff to the Defendant.
 - e. Since the Plaintiff did not file a defence to the counter-claim, each party shall bear his own costs of the counter-claim.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER 2024.

S. OKONG'O

JUDGE

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

The Plaintiff present in person



Mr. Jeji for the Defendant

Ms. J. Omondi-Court Assistant

