



**Caleb & another v Ochieng & another (Environment & Land Case  
86 of 2016) [2023] KEELC 233 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 233 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 86 OF 2016  
A OMBWAYO, J  
JANUARY 26, 2023**

**BETWEEN**

**DUNCAN OMONDI CALEB ..... 1<sup>ST</sup> PLAINTIFF**

**MARY ATIENO AYALO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHEM ONYANGO OCHIENG ..... 1<sup>ST</sup> DEFENDANT**

**AGGREY ALUDA EDEGE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Duncan Omondi Caleb and Mary Atieno Ayeto have come to court against Shem Onyango Ochieng and Aggrey Aluda Edege claiming to be entitled to the whole of Kisumu/Kasule/6584 and a portion of Kisumu/ Kasule/2023 by way of adverse possession and prays for determination of the following issues :-
  - 1 Whether the 1<sup>st</sup> plaintiff's father bought the suit property in 1984.
  - 2 Whether the said 1<sup>st</sup> plaintiff established a home in the said property in 1984.
  - 3 Whether a portion of Kisumu/Kasule/2033 registered in the name of the 2<sup>nd</sup> defendant forms part of the portion occupied by the applicants.
  - 4 Whether the plaintiffs have stayed in the suit property for over a decade without interruption.
  - 5 Whether the 1<sup>st</sup> defendant fraudulently registered himself as the proprietor of the same.
  - 6 Whether the plaintiffs are entitled to be registered as the owners of the suit property.



- 7 Whether the applicants are entitled to orders of permanent injunction restraining the respondents from getting into, encroaching upon or otherwise interfering with the applicant's quiet occupation, possession and enjoyment of the suit land.
  - 8 Whether the applicants are entitled to costs.
2. The originating summon is supported by the affidavit of Willis Obura Ombwayo who is sixty five years old and has lived in Kasule all his life. He served as Chief of Central Kolwa between 1992 – 2005 where the property is located. According to the deponents the plaintiff have been in possession since 1984. The defendant are complete strangers to him. The plaintiffs have established a home on the suit parcel of land. The property was sold to the plaintiffs father by Rosemary Adoyo Ochieng. He is surprised that the property is registered in the names of the defendant. Beatrice Auna Odipo a daughter of Rosemary Adoyo Ochieng states that she is a daughter of Rosemary Adoyo Ochieng and Thomas Owiti Wamwanga. Her mother sold Kisumu/Kasule /1244 to the plaintiffs father and plaintiff's built their houses on the land and planted trees. She used to water the trees.
  3. Duncan Omondi Caleb swore an affidavit and stated that his father legally acquired the parcel of land and the 1<sup>st</sup> plaintiff took possession. He did not know the number of the parcel occupied by himself and sought the help of district surveyor and established that he is occupying Kisumu/Kasule/2033 is registered in the names of the 2<sup>nd</sup> defendant. Kisumu/Kasule/2745 has been subdivided into 6584, 4585, 6586 and registered in the names of the 1<sup>st</sup> defendant. He states that the has been in open peaceful and uninterrupted possession of the said property which is securely fenced with a house and other structures. The defendant has now claimed that they are his tenants. In the replying affidavit sworn by Onyango Ocheing, states that he bought the property as an innocent purchaser for value in the year 2012 and took possession immediately. He followed the legal procedure and there was no objection. He has subdivided the property and sold to 3<sup>rd</sup> parties.
  4. In a further affidavit Duncan Omondi Caleb states that he purchased the property and took immediate possession. When he bought the land, it was in the name of Duncan Omondi Caleb.
  5. When the matter came up for hearing the 1<sup>st</sup> plaintiff testified that the property was his and he was in occupation. The 1<sup>st</sup> defendant approached him and asked him to pay rent. He refused because he had purchased the property. He filed this suit as a result to the request to pay rent. His father bought the land on 3<sup>rd</sup> August 1984. He has been in possession since then. He has been in possession of the land for 33 years. He is now 65 years old.
  6. PW2 Willis Obura Ombwayo a retired chief of the area stated that the plaintiff has developed the land and planted sugar cane.
  7. I have considered the evidence and submissions on record and do find that the plaintiffs father Caleb Joseph Wadenya entered into agreement with Rosemary Adoyo Ochieng for the purchase of Kisumu/Kusule/1244. The agreement was made on July 2, 1984. The plaintiffs husband and wife entered the land and too possession. The plaintiff father and the vendor died before the transaction could be formalized. Later the parcel of land was identified as Kisumu/Kisule /2745 owned by Adleyb Bunde . Adheyan Bunde sold the property to the 1<sup>st</sup> defendant who subdivided it and created Kisumu/Kisule/6584,6585 and 6586. The land to plaintiff occupied since 1984 is now Kisumu/Kisule/6584 registered in the names of the 1<sup>st</sup> defendant. It is not in dispute that the plaintiffs have occupied the property since 1954.
  8. The defendant did not call any evidence hence the evidence of the plaintiff was not contested.



9. The principle of adverse possession is well settled under Limitation of Actions Act. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

- “(1) (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, Section 38 of the Act provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

10. The principle of adverse possession was more elaborately set out in the case of Wambugu v Njuguna [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

11. This right to be adverse to land does not automatically accrue unless the person in whom this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for



orders of adverse possession. Set the findings of the Court in Malindi App No 56 of 2014 *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where it held;

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

12. Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

13. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long has the Applicant been in possession?

14. I do find that the defendants purchase of the suit land did not change the plaintiff right of ownership through the principle of adverse possession. I do grant judgment that the plaintiff father bought the suit property in 1984 and the plaintiff established his house on the property in 1984. That a portion of Kisumu/Kisule/2033 forms a part of the portion occupied by the plaintiff.

15. The plaintiffs are entitled to be registered to the owners of the suit property and do order that they be registered as owners and the names of the defendats be cancelled from the register. I do issue an order of permanent injunction against the defendants restraining them from entering, encroaching or interfering with the plaintiffs quiete occupation, possession and entitlement of the property. Costs to the plaintiffs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**A O OMBWAYO**

**JUDGE**

