



Ongwen & another v Keya & another (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E027 OF 2021
A OMBWAYO, J
JANUARY 26, 2023**

BETWEEN

ORPHA ATIENO ONGWEN 1ST APPLICANT

JOHN OKOTH ONGWEN 2ND APPLICANT

AND

PROF. SHELLEMAH OLOTH KEYA 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

JUDGMENT

1. Orpha Atieno Ongwen and John Okoth Ongwen have come to this court against Prof. Shellemiah Oloth Keya and the National Land Commission by way of Originating Summons under the provisions of section 38 of the [Land Adjudication Act](#) Cap 22 Laws of Kenya Section 28 of the [Land Registration Act](#) No. 3 of 2012 sections 1A, 1B, 3A of the E.P.A Cap 21 laws of Kenya and Order 37 Rule 7 of the [Civil Procedure Rules, 2010](#). The plaintiffs claim to be in actual possession of the suit land for more than 12 years. The plaintiff request the court to determine the following issues:-
 1. Whether the applicants have been in occupation, use and in peaceful possession of a portion of the parcel of land now known as land reference number 15329 or part thereof and with the knowledge of and intimation of and or constructive knowledge of the respondents or any other person (s) or Government Officials who conferred title to the 1st respondent for a period stretching to over twelve (12) years and by prescriptive rights.
 2. Whether the respondent had actual or constructive knowledge or had reasons to believe that as at the time the 2nd respondent was conferring title to the 1st respondent, the applicants' interest and rights were well within the knowledge of the respondents and the 1st respondent acquired the said title to the overriding interest of the applicants as provided for under the [Land Registration Act](#) No.3 of 2012.



3. Whether the 1st respondent acquired a legal and valid title in line with the provisions of the law.
 4. Whether the applicant's patrilineal rights and interest in the subject parcel of land were extinguished by Kenya Gazette notice No.3400 of 1976 and if not, then what are the legal implications?
 5. Whether the Government of the Republic of Kenya and on behalf of the then Kisumu County Council compensated the applicants and their direct lineage of their family as per the Kenya Notice No.3400 of 1976.
 6. Whether the Government of the Republic of Kenya perfected Gazette Notice No.3400 of 1976 and acquired the land parcels indicated in the said Kenya Gazette Notice and transferred same into the name of Kisumu County Council.
 7. How did the 2nd respondent issue two deferent titles to two different entities regarding the area the applicants are occupying.
2. The plaintiff prays for a declaration that the 1st respondent's title regarding land reference number 15329 within Kisumu County was illegally acquired hence same is invalid and has no legal consequences. Moreover, they pray for a declaration that the 2nd respondent illegally and an un-procedurally conferred an invalid title to the 1st respondent. Furthermore, a declaration that Kenya Gazette Notice No.3400 of 1976 was never implemented and the intended parcels of land were never transferred to Kisumu County Council or same never remained the property of the Kenyan Government.
 3. The plaintiff further pray for a declaration that by virtue of the applicants occupation, user, possession and peaceful enjoyment of that parcel of land known as Land reference Number 15329 through their later husband and father respectively stretching through to their father in-law and grandfather and great grandfather respectively with accumulative of over 70 years, the applicants interests overrides the 1st respondents interest in that land reference number 15329 situate within Kisumu County.
 4. The plaintiffs prays for a declaration that they are the bona fide owners of a portion of land comprised in land parcel now known as Lr Number 15329 by virtue of Adverse possession and prescriptive rights and an order that the Grant No.I.R 726283 and I.R No.15329 issued to the 1st respondent by the 2nd respondent on 9th December 2002 be revoked and/or cancelled and the register rectified by removing or cancelling or deleting the name of the 1st respondent and replacing it with those of the applicants and same be transferred into their name by the 2nd respondent. Last but not least, the plaintiff prays that the respondent be ordered to pay costs of this suit.
 5. In the supporting affidavit, the plaintiffs describe themselves as a widow and son respectively to the late Joshua Ongwen Wagude. It is stated that their father was buried in the suit parcel of land and that their homestead was to be acquired by the Government on behalf of Kisumu County Council under Trust Lands Act. That after Gazettement of the acquisition, the Kisumu County Council organized for the eviction of residents. The eviction created open space whose title was issued to influential people. They are in active occupation of the land parcel of land. Before their father died, one Philips Ochieng Otieno sued them in respect of the land. The plaintiff allege that the land was not properly acquired hence titles are illegally acquired.
 6. In the replying affidavit of Shellemiah Okoth Keya, the current registered owner and proprietor of L.R No.15329 as per grant dated 23rd June 2010 for a period of 99 years with effect from 1st December 1990, he states that he acquired ownership of the property legally. He showed the court the application, letter of allotment and the letter of acceptance. He made the necessary payments. He showed the court the



- deed plans. He commissioned architects to prepare architectural plans and building plans. He states that before he could construct, people invaded his land and started constructing temporary structures. One of the invaders was John Okoth Ongwen the 2nd plaintiff. The 1st respondent decided to fence his property and engaged the police.
7. The 2nd plaintiff was charged with the offence of forceful entry. The 1st respondent put up a concrete wall round his property. He filed suit number Kisumu ELC No.60 of 2017, Shellemah Okoth Keya v Joanes Thiyo & Bonface Oriti. The defendant sought injunction that was dismissed. He states that the plaintiffs made a complaint in respect of his title to National Land Commission, the complaint was heard by National Land Commission and his title was upheld.
 8. He commissioned surveyors to undertake a survey and establish that the plaintiffs are not occupying his parcel of land.
 9. When the matter came before me for hearing on 20th July 2022, it was agreed that the matter be fast tracked for hearing. The Originating summons dated 16th June 2021 and the supporting affidavits were treated as plaint. The replying affidavit was treated as defence. The documents and affidavits were treated as evidence. The case was to be treated as case stated and to be dealt with by way of submissions.
 10. The plaintiffs submits that their concern is that their land was compulsory acquired by the Government under the Land Acquisition Act, Cap 295 Laws of Kenya through a Gazette Notice No.3400 dated 19th November, 1976. That the Gazette giving rise to the matter before this court is No.3400 dated 19th November 1976 issued by J.R Njenga the then Commissioner of Lands. The said Gazette Notice read as follows:-
 11. That this matter touches on the right to property, the proper starting point when considering it is the Constitution of Kenya at the relevant time, thus the retired Constitution. Section 75 of the Constitution provided as follows:-

“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:-

 - a. The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote in public benefits, and
 - b. The necessity thereof is such as to afford reasonable justification for the causing of hardship that may resort to any person having an interest or right over the property; and
 - c. Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”
 12. Pursuant to the provisions above, the Land Acquisition Act Chapter 295 was enacted. Under section 6(1) of the Act, the Minister has to be satisfied that the purpose of acquiring the land complies with provisions of Section 75 (1) (a) of the retired Constitution and also that the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land. Those requirements are absolutely necessary. Such acquisition must be done in conformity with the Constitutional provisions aforesaid and in absolute good faith. Where the Minister is so satisfied he directs the Commissioner of Lands to acquire the land compulsorily. On receiving a direction from the Minister, the Commissioner of land causes a notice to be published in the Kenya Gazette and a copy thereof is served upon every person who appears to be interested in the



- land. The Commissioner is under an obligation to pay full compensation to all persons whose land is so acquired.
13. plaintiff refers to Section 19 of the Land Acquisition Act that deals with taking of possession of and vesting of the acquired land in the Government and stipulates that upon the land so acquired being vested in the government, a notice that possession of the land has been taken and that the land has been taken and that the land has vested in the Government and a notice to that effect has to be served upon all registered proprietors of the land or those who have interest on the said land.
 14. According to the plaintiff, there is no evidence adduced by the defendants that indeed a notice to the effect that the Government had acquired the land and that the same was now vested in the Government.
 15. The plaintiff referred to Section 8 of the Trust Land Act Cap 288, reads as follows:-

:8(1) where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who-

 - (a) Under African Customary Law for the time being in force and applicable to the land has any right to occupy any party thereof; or
 - (b) Is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.

(2) A notice of setting apart published under section 7 of this Act shall also be published by displaying a copy at the District Commissioner's office and at some other public or conspicuous place in the area concerned"
 16. There was no notice published and a copy displayed at the District Commissioner's office and at some other public or conspicuous place in the area concerned as required under section 7(20) of the Trust Land Act .

Section 9 of the Trust Act reads as follows:-

"9 (1) A person who claims to be entitled to compensation under section 8 of this Act shall apply therefore to the District Commissioner".
 17. The defendant on his part submits that the claim is based on Section 38 of the Limitations Act (Cap 22), Section 25 of the 25 of the Land Registration Act (Cap 300) and Order 37 Rule 7 of the Civil Procedure Rules. It is a claim founded on the doctrine of Adverse Possession. No right of action to recover land accrues unless the lands are in the possession of some person in whose favor the period of limitation can run. The statute does not begin to operate unless and until the true owner is not in possession of his land. The defendant submits that the plaintiffs' claim is premature, ill conceived, and misconceived, misbegotten and bad in law. The 1st defendant has demonstrated that he became registered as proprietor /owner of all that parcel of land known as L.R 15329 (1, R. 126283) on 23rd June 2010.
 18. plaintiff filed this suit on 1st June 2021. The 1st plaintiff was registered as the owner of the parcel of land the subject matter of this suit on 23rd June 2010. The plaintiffs instituted the suit before the statutory period of 12 years. Accordingly, the suit was instituted prematurely.
 19. The defendant relies on Platt, J.A in Kisee Maweu v Kiu Ranching, (1982- 88) KAR 746 referred to another Court of Appeal decision which dealt with the same section and its effect thus:-
 20. In the Alibhai case, it was decided that certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein



subject to no other interests than those mentioned therein. Secondly it was held that no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate. So it follows that from the time a person acquires registered land the period of limitation runs from that time and not before.”

21. According to the defendant, the Grant shows that the 1st Respondent was registered as the owner/ proprietor of L.T No.15329 (I.R 126283/1) on the 23RD June 2010. The grant is signed on 23th June 2010 and stamped at the Land Titles Registry, Nairobi Registry on 23th September 2010. This then means that the 1st defendant became the owner of the said parcel of land in 2010. That is the date when the clock on the doctrine of adverse possession started ticking against his interest. Anyone who wishes to claim prescriptive rights under Section 38 of the Law of Limitations Act (Cap 22) could only be entitled to do so after a period of more than twelve (12) years shall have lapsed thus after either June of September of 2022. This suit was filed a year before the statutory period of twelve (12) years.
22. The defendant further submits that Section 41 of the *Limitation of Actions Act* (Cap 22) bars claims against the Government based on the doctrine of Adverse Possession. The Act does not enable a person to acquire any title to, or any easement over Government land or land otherwise enjoyed by the Government, mines or minerals as defined in the Mineral Oil Act (Cap.307), water vested in the Government by the *Water Act* (cap.372), land vested in the County Council (other than land vested in it by Section 120 (8) of the Registered *Land Act* (Cap.300) or land vested in the Trustees of the National Parks of Kenya; or before the publication of Gazette Notice No.3400 of 1976, the area in which the parcel of land the subject matter herein lies was Trust Land in the hands of the then County Council of Kisumu. After the publication of the said Gazette Notice, the area mentioned in the notice became Government Land or land otherwise enjoyed by the Government and hence falls within those that are covered by Section 41 of the Limitation of Actions At (Cap 22), the land is not available as a subject of the doctrine of Adverse Possession.
23. The defendant contends that the plaintiffs have failed to establish the mandatory ingredients of the doctrine of Adverse Possession. They have not established that they have been and are still in occupation of L.R No.15329 I.R No. 126283/1) or any portion thereof.
24. To the contrary, the 1st defendant claims to have availed a ground report by a registered land surveyor as well as Google diagrams that show that neither of the plaintiffs is in active, actual possession and or occupation of even a portion of L.R 15329 (I.R 12683) as they allege or at all.
25. The plaintiffs have not set out a specific date when the persons through who they claim entered into the land, they have not demonstrated the nature/manner of such entry and the nature of the alleged occupation or that the 1st Defendant has been dispossessed of land on his own abandoned possession/occupation. The defendant further submitted that there is no evidence that the plaintiffs are in possession of the suit land.
26. I have considered the claim and submissions on record and do find that there are two claims. The first claim is based on allegations that the process of compulsory acquisition was not properly done by the state. The second claim is based on allegations that the plaintiffs have acquired the ownership of the parcel of land by virtue of adverse possession.
27. On the first claim that the parcel of land was illegally compulsorily acquired by the state, I do find the same to be misplaced in an originating summons. The starting point for a claim on adverse possession is that the defendant must be having a legal title. One can't claim adverse possession on an illegal title, it must be on a legal title. Therefore, the claim by the plaintiff that the title was illegally obtained fails as the same is improperly before this court.



28. The proper case for determination is the one on the issues based on adverse possession, where I find that the defendant obtained title to the suit property on 23rd June 2010 and yet the suit was filed on 25th June 2021. By the time of filing the suit, 12 years had not accrued hence the suit was filed prematurely. Moreover, the plaintiffs have not demonstrated that they are in active occupation of the suit land with the knowledge of the defendant. 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.”

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.”

29. 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 Kahindi Ngala Mwagandi* [2015] eKLR where it held;



30. 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.
31. 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...”
32. 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?
33. The plaintiffs do not satisfy the requirements to be declared in adverse possession as they have not demonstrated to be in actual possession of the land. Even if they were in possession of the land the prerequisite 12 years have not accrued. Moreover, an order of adverse possession cannot be made against the Government. Section 41 of the Limitation of Actiona ACT Cap 22 Laws of Kenya provides that the doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the *Limitation of Actions Act* excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-
41. Exclusion of public land
- This Act does not -
- a. enable a person to acquire any title to, or any easement over -
 - i. Government land or land otherwise enjoyed by the Government;
 - ii. Mines or minerals as defined in the *Mining Act* (Cap. 306);
 - iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - iv. Water vested in the Government by the *Water Act* (Cap. 372);
 - v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered *Land Act* (Cap. 300)); or
 - vi. Land vested in the Trustees of the National Parks of Kenya; or



34. In the case of *Ravji Karsan Shanghani v Peter Gakumu* [2019] eKLR the court considered whether adverse possession could apply to land owned by the Government and at paragraph 15 of the judgment the court stated as follows:-

“ 15. The Defendant was allocated the suit land on 23rd April 1986 following his application for allocation. At the time of allocation, the land was unsurveyed and it constituted part of Government land and that is how the Government could alienate it. It is trite law that adverse possession cannot accrue against land that is owned by the Government. The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government’s rights and interest over the land could be extinguished.”

35. The upshot of the above is that the suit by the plaintiffs fails and the same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 26TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

