



**Okado v Odhiambo (Environment & Land Case 14 of 2021)  
[2023] KEELC 179 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 179 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 14 OF 2021**

**AY KOROSS, J  
JANUARY 26, 2023**

**BETWEEN**

**JOSEPHINE TAKA OKADO ..... PLAINTIFF**

**AND**

**DAVID ODHIAMBO ..... DEFENDANT**

**JUDGMENT**

1. By an originating summons dated September 16, 2014, the plaintiff instituted suit against the defendant who is the registered proprietor of land parcel number North Ugenya/Ndenga/506 hereinafter “suit property”. She raised the following issues for this court’s determination;
  - a. Whether the defendant and his predecessor in title John Onyunde Ogola had ever been in occupation and possession of the suit property;
  - b. Whether the plaintiff is the registered owner of North Ugenya/Ndenga/507 which was adjacent to the suit property and there existed no boundary between these two parcels of land; and
  - c. Whether the plaintiff utilized the suit property and North Ugenya/Ndenga/507 continuously, quietly and uninterrupted and regarded them as one parcel of land;
  - d. Who shall bear costs.
2. She sought the following orders; a declaration the defendant’s title to the suit property was extinguished, her claim of adverse possession had accrued and she be declared the owner.
3. The summons was unsupported; the plaintiff merely filed a verifying affidavit which verified the averments made in the originating summons.



4. The defendant filed a replying affidavit dated December 5, 2014 in which he deponed inter alia; having succeeded the estate of his deceased father John Ongunde Ogola, he was the proprietor of the suit property; the suit property and North Ugenya/Ndenga/507 which the plaintiff inherited from her deceased husband adjoined each other and there existed a clear boundary between them; both properties were 1<sup>st</sup> registrations; the plaintiff's claim had not accrued and she had failed to disclose when time started to accrue.

#### **Parties' evidence**

5. The plaintiff testified as PW1, she adopted an alleged supporting affidavit as her evidence in chief. It was her testimony she became aware in April 2014 the defendant owned the suit property. A visit to the ministry of lands affirmed this position; it was distinct from her parcel of land known as North Ugenya/Ndenga/507. She had been in peaceful, uninterrupted and quiet possession of the suit property.
6. In her oral testimony she testified she owned North Ugenya/Ndenga/507 which did not have an existing boundary with the suit property. She ploughed and cultivated crops on North Ugenya/Ndenga/507. She produced the green cards of the suit property and of North Ugenya/Ndenga/507 in support of her case.
7. On cross examination, she testified her deceased husband and the plaintiff's father had been friends and she had sued the defendant because he had brought people to North Ugenya/Ndenga/507 after claiming the parcel of land belonged to him. The suit property belonged to her in-law known as Orago. In re-examination, she reiterated the averments made in her exam in chief and cross examination. In addition, she testified upon Orago's death in the year 1970, she started utilizing the suit property.
8. PW2, Monica Juma Wanga adopted her witness statement in which she testified that with the plaintiff's permission, she started using the suit property in the year 1974. The defendant became known to her in 2014. In cross examination, she testified the plaintiff permitted her to use a parcel of land known as 57, the defendant was unknown to her and she never prepared or signed a witness statement. In re-exam, she testified she ploughed the suit property and kept animals on it.
9. PW3, Vitalis Ochieng Obare adopted his witness statement in which he testified the plaintiff and her husband had utilized the suit property and land parcel no. Ndenga/505 and in the year 2014, the defendant claimed his father had bought the suit property from the plaintiff's husband and when he demanded documents as prove of ownership from the him, the defendant showed him a title document. It was his testimony the plaintiff used the suit property prior to 1972 and continued to do so.
10. In his oral testimony he testified the defendant and defendant's father were unknown to him and the plaintiff's husband owned North Ugenya/Ndenga/507 and he did not know who owned the suit property. In cross examination, he testified the plaintiff's husband owned North Ugenya/Ndenga/507 and not 505 and his statement was untruthful; he and the defendant had never met.
11. The defendant's application for an adjournment was declined and his case was closed without him testifying.

#### **Parties written submissions.**

12. As directed by the court, the plaintiff's counsel M/s Balongo & Co. Advocates filed their written submissions dated October 24, 2022. In it, they reiterated the averments made in the plaintiff's testimony and this court need not restate them. They submitted the plaintiff's testimony was not



rebutted and she had met the ingredients of adverse possession. They urged this court to allow the plaintiff's claim.

13. As at the time this court was writing this judgment, the defendant's counsel had not filed his written submissions. If at all they will be filed, this court will consider them as having being filed out of time.

### **Analysis and determination**

14. The defendant did not testify and in absence of his evidence, his pleadings merely remained allegations. Failure by the defendant to testify led to the plaintiff's evidence being unrebutted however, this did not presuppose she had satisfied the standard of proof.
15. I have perused and considered the plaintiff's pleadings, evidence adduced by her and her witnesses before this court together with her submissions. In my considered view, the issues falling for determination are; (i) whether the plaintiff's suit was competent (ii) whether the plaintiff proved she was an adverse possessor (iii) what appropriate orders should be granted? and (iv) who should bear the costs of this suit?

### **I. Whether the plaintiff's suit was competent**

16. Order 37 Rule 7 of the Civil Procedure Rules as follows:

'7. Adverse possession [Order 37, rule 7.]

- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.' (Emphasis added)

17. Though the plaintiff testified she desired the court to adopt her supporting affidavit, this court has scrutinised the record and what she adopted was a witness statement and not a supporting affidavit; she misled the court.
18. Order 37 Rule 7 is couched in mandatory terms. In my considered view, the framers of this proviso were alive that the depositions contained in such a supporting affidavit would assist the opposing party to know the nature of the case and the issues he was facing in order for him to prepare an appropriate response in defence to the claim he was facing.
19. Such an affidavit would have assisted the court in establishing the issues in contestation. The verifying affidavit which was filed to verify the averments of the originating summons was non-suited.
20. This was not a technical error but rather a substantive issue that goes to the root of the issues for determination; laying a basis for her claim of adverse possession. It was fundamental and could not be discharged by Article 159(2)(d) of the *Constitution*. I place reliance on the Supreme Court of Kenya decision in *Odinga v Independent Electoral and Boundaries Commission & 3 others* (Petition 5 of 2013) [2013] KESC 2 (KLR) (26 March 2013) (Ruling) where the court expressed itself as follows;

'The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.'



21. It is my finding the plaintiff's suit was fatally incompetent for failure to file an affidavit in support of the originating summons and I hereby strike it out.

## **II. Whether the plaintiff proved she was an adverse possessor**

22. Notwithstanding the finding on the 1<sup>st</sup> issue has determined the dispute, I am of the considered view that it is pertinent for this court to deal with the 2<sup>nd</sup> issue.

23. The doctrine of adverse possession is embodied in statutory provisions and common law. Sections 7, 13 and 38(1) of the *Limitation of Actions Act* lay down the legal framework. These provisions of law will be enunciated below in verbatim. Sections 7 provides:

‘An Action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

While Section 13 states;

- 1 A right of action to recover land does not accrue unless the land is in 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 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.’

Lastly Section 38(1) provides thus:

‘(1)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.’

24. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal laid down the principles of adverse possession as follows;

‘A person who claims adverse possession must inter alia show: (a) on what date he came into possession. (b) what was the nature of his possession? (c) whether the fact of his possession was known to the other party. (d) for how long his possession has continued and (e) that the possession was open and undisturbed for the requisite 12 years.’

25. From the register of the suit property that was produced, there was no dispute the suit property was registered in the defendant's name on October 22, 2013 and prior to that, it was registered in his father's name on July 20, 1970; this was a 1<sup>st</sup> registration.

26. Contrary to documentary evidence, the plaintiff in her oral testimony testified the suit property belonged to her in law known as Orago and upon his demise in 1970, the suit property was occupied and possessed by her since then. Her evidence in chief that she had always leased the suit property to



- PW2 was contradicted by PW2 when she testified that the plaintiff allowed her to plough a parcel of land known as parcel no. 57. PW3 never testified of any lease over the suit property.
27. Though PW3 testified the plaintiff occupied the suit property from 1972, in his cross examination, he testified he was not was privy to the suit property.
  28. PW2 denied she ever prepared or signed a witness statement. Similarly, too, PW3 in his cross examination admitted that a portion of his statement was untruthful. Having denounced their statements, the plaintiff's case fell like a house of cards.
  29. The plaintiff never adduced evidence that Orago ever existed or that he was ever registered as the owner of the suit property. Having not established Orago's ownership and occupation over the suit property, the allegation she entered the suit property upon his demise was unsubstantiated. Additionally, the plaintiff did not adduce any evidence whether the defendant or his father had been dispossessed off the suit property or they had discontinued their possession of it or that she gained entry to the suit property by such actions.
  30. In any case, the assertion of a lease agreement between her and PW3 was unsupported. She did not produce any evidence of such monetary payments to show the existence of such a lease.
  31. Having denied the defendant's ownership over the suit property by alluding it was owned by Orago or that it was part of North Ugenya/Ndenga/507, the plaintiff's claim failed. I say so because one cannot deny a person's title over the suit property and at the same time lay a claim of adverse possession. In the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi (Supra) the court expressed thus in its dicta;
 

‘...the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession...’
  32. An examination of the evidence on record revealed that the plaintiff's claim was contradictory and full of falsehoods. I am not convinced that on a balance of probabilities the plaintiff proved her claim of adverse possession. Had I not struck out the plaintiff's case, it would have been my finding that the plaintiff did not prove her case on a balance of probabilities. For the reasons herein stated above, the plaintiff's suit is hereby struck out with costs to the defendant.

**Delivered and Dated at Siaya this 26<sup>th</sup> day of January 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**26/01/2023**

**Judgment delivered virtually through Microsoft Teams Video**

**Conferencing Platform in the Presence of:**

**In the Presence of:**

N/A for the parties

Court assistant: Ishmael Orwa

|  |   |
|--|---|
| <i>siaya elc (os) 14 of 2021 (judgement)</i> | 0 |
|--|---|

