



REPUBLIC OF KENYA



**Ooro v Ondiek (Environment & Land Case 30 of 2021)
[2023] KEELC 235 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 30 OF 2021
A OMBWAYO, J
JANUARY 26, 2023**

BETWEEN

BENARD OCHIENG OORO PLAINTIFF

AND

JOHN OWINO ONDIEK DEFENDANT

JUDGMENT

1. Benard Ochieng Ooro has hereinafter referred to as the plaintiff came to court by way of Originating Summons against John Owino Ondiek hereinafter referred to as the defendant by way of Originating Summons requesting the court to determine the following questions:-
 1. Whether the plaintiff/Applicant is entitled to the suit property vide adverse possession?
 2. Whether the suit property should be registered in the name of the plaintiff/applicant?
 3. Who should pay the plaintiff's costs of this summons.
2. The questions are in respect of property NoKisumu/Ojola/3719 which to plaintiff, claims to have acquired through adverse possession. In the supporting affidavit, plaintiff states that he has been occupying the property for more than 12 years since the day he was born. In 1992 without any disturbances and the property is registered in the names of the defendant. He has built on the land sired on the land and raised a family on the land and most importantly farmed on the land. He has invoked the principle of adverse possession. In the replying affidavit the defendant states that he bought the land in dispute from Sabastian Onyango Muga who was registered then. Sebastian Onyiyo Muga bought the land from Paulus Oora Muga the first registered owner. He claims that Sebastian had vacant possession of the land. The defendant states that the plaintiff is a son of Paulus Oora Muga who have their own land. He states that the plaintiff built his house on the land in the year 2017. The defendant admits that when he bought the land, the plaintiff had built his house. He however dispute to allegations that the plaintiff has been in possession for more than 12 years.



3. The plaintiff submits that:-

“From the facts of the case, the plaintiff/applicant avers that he was born on the suit parcel on the August 6, 1992 and since then he has grown up on the said suit parcel, built a house and raised a family without any interruptions from succeeding registered owners of the suit parcel one Sebastian Onyango Muga and now John Owino Ondiek.

Facts has not been challenged in evidence by the defendant/respondent and he concedes to the same.

In the decided case of *Kasuve v Mwaani Investments Limited & 4 Other*, the Court of Appeal restated what a plaintiff in a claim for Adverse Possession has to prove which is, “In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without permission for a period of 12 years either after dispossessing the owner or by discontinuation by the owner on his own volition.

There is nothing in the replying affidavit sworn by the defendant/respondent nor any evidence adduced which demonstrates or explains why he has not taken ownership of the suit parcel upon purchase.

It was the onus of the defendant/respondent to ensure that he either takes vacant possession or the suit parcel upon purchase of the same or institute any act including an eviction order that would interrupt the quiet occupation of the plaintiff/applicant that is now culminating in this claim of adverse possession that is now before this honorable court. To date he has not done so.

In the case of *Joseph Gahumi Kirty v Lawrence Munyambu Kabura Ca No 20 Of 1993* the learned Judge Justice Kwach as he was then stated as follows: “... time which has begun running under the Act is topped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry, or sue for recovery of the land.”

The plaintiff submits that the change of ownership of land did not interrupt the plaintiff's report of adverse possession.

The defendant submits that the general impression of the doctrine of adverse possession has been equated to actions of an aggressive squatter whose wrongful possession is eventually validated with the passage of time. The germane issue is whether the plaintiff should acquire title by way of adverse possession. The answer is in the negative. The plaintiff attempted to claim the suit land in the year 2017 when he built a semi-permanent structure thereon. This therefore falls short of the legal requirement of stay for over 12 years in order to claim the land adversely.

The Court in *Malindi App No 56 of 2014 Mtanalewa v Kabindi Ngala Mwangandi* [2015] eKLR held that: “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. It must be adequate in continuity, in publicity and in extend to show that possession is adverse to the title owner.”



Additionally, the court in *Francis Gichuru v Peter Njoroge Mairu* [2005] eKLR while replying in the case of *Kimani Ruchire v Swift Rutherford & Co Ltd* [1980] klr 10 at page 16 Letter B, Kneller J (as he then was) held that in order for a claim of adverse possession to succeed. “the plaintiff has to prove that he used the land which he claims as of right, nec vi,nec clam,nec precario meaning no force, no secrecy, no persuasion. The plaintiff must show that the defendant had knowledge or the means of knowing actual or constructive possession or occupation... Such possession must be continuous it must not be broken for any temporary purpose or any endeavor to interrupt it by way of recurrent consideration.”

4. The plaintiff has not proved his case to the required standards for reasons that in the year 2016 the plaintiff placed a restriction on the suit parcel and one Sebastian Onyango Muga who sold the suit land to the defendant did object to the same and after a hearing by the County Lands Registrar the said caution was removed. Further, there is no evidence that the plaintiff has had peaceful and uninterrupted occupation of the suit land.
6. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria explained in *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR while relying on the case of *James Mwangi & Others v Mukinye Enterprises Ltd*, High Court Civil Case No 3912 of 1986, it was held that a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years. Hence, the five basic elements must be met to perfect the title of the adverse party
7. Plaintiff has not satisfied the elements enunciated above for a claim of adverse possession to accrue.
8. As provided under section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the court, and the said discretion must be exercised judiciously. However it is also trite that cost follow the event
9. The court in *Cecilia Karugu Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, while relying in the case of *Republic v Rosemary Wairimu Munene, Ex parte Applicant v Ihururu Dairy Farmers Co-operatives Society Ltd* [2014] eKLR held that the issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow event.... It is well recognized that the principle of costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”
10. I have considered the evidence on record and submissions and do find that the plaintiff has lived on the land since he was born until an adult and today. Though part of the time he lived on the land he was a minor but if not disputed that he has lived on the land for the whole of his life. The first purchaser Sebastian Onyiyo Muga was requested on August 16, 1988 but did but attempt the evicts to plaintiff. The 2nd buyer the defendant, John Owino Ondiek bought the property, and was registered on April 26, 2018 but has not attempted to evict the plaintiff. I do find the plaintiff has been in possession of the suit property, though sometimes and a minor for more than 12 years.
11. 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.”

12. 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.”

13. 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.”

14. 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 Mwagandi](#) [2015] eKLR where it held;

15. 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.

16. 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...”

17. 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?
18. I do find that the plaintiff he has been occupying the property for more than 12 years since the day he was born 1992 without any disturbances and the property is registered in the names of the defendant. He has built on the land sired on the land and raised a family on the land and most importantly farmed on the land therefore, he has been in adverse possession of the suit property and I ultimately do find that he is entitled to the suit property by virtue of adverse possession. I do order that the suit property be registered in the plaintiffs name and the name of the defendant be cancelled from the register. Cost of the suit to the plaintiff

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAYS OF JANUARY 2023.

A O OMBWAYO

JUDGE

