



Otieno v Ochola & another (Sued as the joint administrators of the Estate of John Adegga Otieno) (Environment and Land Miscellaneous Application 3 of 2021) [2023] KEELC 221 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 221 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2021
AY KOROSS, J
JANUARY 26, 2023

BETWEEN

JOSINTA NGESA OTIENO PLAINTIFF

AND

MAURICE OTIENO OLAMBO 1ST DEFENDANT

HERINE ATIENO OCHOLA 2ND DEFENDANT

SUED AS THE JOINT ADMINISTRATORS OF THE ESTATE OF JOHN ADEGA OTIENO

(Originally Kisumu ELC Misc. Application No.45 of 2017 (O.S.))

JUDGMENT

1. By an originating summons dated February 19, 2014, the plaintiff instituted suit against the defendants who were the administrators of the estate of John Adegga Otieno [deceased] who was the registered owner of land parcel no. Siaya/Kobong/269 [‘suit property’]. She raised the following issues for this court’s determination;
 - a. Whether she and her husband James Otieno Oyile [deceased] took possession of the suit property in the year 1980 and had an overriding interest over it pursuant to sections 28(a)(c)(e) and (j) of the *Land Registration Act*;
 - b. Whether upon the death of James Otieno Oyile in the year 1999, she had independently acquired title over the suit property by way of adverse possession and it should vest in her; and



- c. Whether the Siaya district land registrar should be directed to register the plaintiff's rights over the suit property.
2. The summons was supported by the affidavit deposed by the plaintiff on February 19, 2014 and a further affidavit deposed on March 14, 2014.
3. In opposition, the defendants filed a joint replying affidavit sworn on October 27, 2014 in which they denied the allegations made by the plaintiff. One of the defendants, Herine Atieno Ochola died on April 20, 2021. Her demise transpired during the course of these proceedings.

Plaintiff's evidence

4. The plaintiff testified as PW1, she adopted the averments deposed in her supporting affidavit. She testified inter alia, she and her husband bought the suit property in the year 1980; they neither obtained consent from the land control board nor was a transfer made in their favour; her husband died in the year 1999 and she continued occupation; she had been charged in Bondo PM Criminal Case No.829 of 2013 for trespass and consequently, she was unable to access the suit property and she had met the legal threshold of adverse possession. She produced the green card of Uyoma/Kobong/269 in support of her case.
5. During cross examination, she testified she had just become aware that the green card of the suit property was closed; she only ploughed a portion of it and by an agreement of sale, her husband purchased the suit property. Her occupation had not been peaceful and she only ploughed two acres of it.
6. In re-examination, it was her testimony that she was not involved in the subdivision process. Upon her husband's demise, she continued ploughing the suit property. Her evidence was led by George Oginga Olango and Michael Omondi Ochola who respectively testified as PW2 and PW3.
7. PW2, adopted his witness statement dated October 6, 2020. He testified that he was privy the plaintiff's husband bought the suit property from the deceased and she had been tilling it from 1980 to date.
8. During cross examination, he testified his statement failed to disclose the parcel of land the plaintiff tilled and the plaintiff's husband only purchased 2 acres from the deceased. The defendants were his relatives; a step brother and sister in law respectively.
9. PW3's evidence in chief was a corroboration of PW2's evidence in chief. During cross examination, he testified he was not aware the suit property had been subdivided and someone occupied the portion that had been utilized by the plaintiff.

Defendant's evidence

10. Maurice Otieno Olambo, one of the defendants testified as DW1. He adopted his witness statement dated November 26, 2021. It was his testimony that the plaintiff had not been in occupation of the suit property. Upon her trespass thereupon in the year 2013, they caused her to be criminally charged.
11. They conducted probate proceedings on the deceased's estate and they had subdivided the suit property into 7 portions; Uyoma/Kabong/2904, 2905, 2906, 2907, 2908, 2909 and 2910. Subsequently Uyoma/Kabong/2909 was subdivided into Uyoma/Kabong/3080 and 3081 and transferred to 3rd parties.
12. His co-defendant Herine died on April 20, 2021 and she had not been substituted in these proceedings. In support of his case he produced several documents which included the suit property's green card,



searches for several parcels of land that emanated from the suit property, Herine's death certificate and judgment of Bondo PM Criminal Case No.829 of 2013. He was not cross examined.

Parties' written submissions.

13. At the time of penning this judgment, the plaintiff's counsel Mr.Ogonda had not filed his submissions. If at all they will be filed, the court will consider them as having been filed out of time.
14. The defendants counsel Mr. Omollo filed his written submissions dated November 8, 2022. Counsel submitted from the evidence adduced, the plaintiff had not met the threshold to sustain a claim of adverse possession because, from her testimony, it was evident that she had not been in occupation from the time she was charged with the criminal offence of trespass and the suit property was nonexistent. In support of his submissions, counsel relied on several authorities including the case of *Symon Gatutu Kimamo & 587 others v East African Portland Cement Co. Ltd* [2011] eKLR where the court stated;

'16. Adverse Possession is a question of fact. Possession is hostile if it is open, without right, without force or fraud, and exclusive.'
15. Counsel submitted the plaintiff was in contravention of Order 37 Rule 8 of the *Civil Procedure Rules* for failing to tender an extract of the title document in support of her claim. According to counsel, the suit property was no longer in existence and it behooved upon the plaintiff to identify where her portion lay amongst the subdivided portions, annex the extract of the title document to this particular parcel of land and join the particular registered owner to these proceedings. Counsel placed reliance on the case of *Kweyu v Omuto* (1990) KLR 709 where the court held thus;

'...the appellants supporting affidavit to his originating summons did not have annexed to it a certified extract of the title to the parcel of land...an order under section 38(1) was therefore incapable of being made'.
16. Counsel submitted the plaintiff had not proved her case on a balance of probabilities and prayed for dismissal of her case with costs to the defendant.

Analysis and determination

17. I have considered the parties' pleadings, evidence and defendant's submissions and in my considered view, the issues falling for determination are; (i)whether the plaintiff's claim against Herine Atieno had abated(ii) whether the defendants were in contravention of the doctrine of lis pendes (iii)whether failure by the plaintiff to avail an extract of the suit property was fatal to her case (iv) what appropriate orders should be granted? and (v)who should bear the costs of this suit?

I. Whether the plaintiff's claim against Herine Atieno had abated

18. Order 24 rule 4 of the *Civil Procedure Rules* provides as follows;
 - (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.



- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant'. Emphasis added.
19. This provision of law is couched in mandatory terms that substitution has to be conducted within one year from the demise of a defendant failure of which, the suit abates against her by operation of law. It was undisputed Herine Atieno Ochola died on April 20, 2021 and it goes without saying that in the absence of her substitution by April 20, 2022, the suit against her had abated.

II. Whether the defendants were in contravention of doctrine of lis pendes

20. When the plaintiff claimed to be an adverse possessor of the suit property, it was still registered in the deceased's name. This is evidenced by the green card extract that was produced by the 1st defendant. The extract that was produced by the plaintiff was for an entirely different parcel of land and I shall address this in my analysis of issue no. 3.
21. On March 7, 2018, the defendants effected the confirmation of grant issued in Kisumu High Court Succession Cause No. 82 of 2013 on March 12, 2018. There was nothing wrong with this. Shortly thereafter on April 24, 2018, they subdivided it into several portions.
22. The trail gets cold on whether the subdivisions were transferred to themselves first before they transferred some of them to 3rd parties. Be that as it may, some of the subdivisions are in the names of several 3rd parties and one of them has even been further subdivided. In essence, the nature of the plaintiff's claim was altered. It is evident the subdivisions and eventual transfer to various 3rd parties took place on or after April 24, 2018 which was during the pendency of these proceedings.
23. The actions of the defendants were in contravention with the common law doctrine of lis pendes where a party is presumed to have been aware of the pending proceedings in a court of law and is prohibited from alienating a suit property pending the determination of the suit. The case of *Bernadette Wangare Muriu v National Society Security Fund Board of Trustee & 2 others* (2012) eKLR summarized the applicability of this doctrine as follows;
- ‘(i) The applicability of the doctrine or maxim of Lis Pendens starts right from the time the proceedings are initiated and remains applicable until the initiated proceedings are finally determined and decree issued and executed. (ii) It operates to prevent the initiated proceedings from being rendered null and void by protecting and preventing the subject of the proceedings from becoming extinct. (iii) It binds not only parties to the litigation but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of the litigation or not’.
24. I am not in doubt the defence bundle of documents was served upon the plaintiff's counsel which obviously evidenced the new developments. This court is flustered as to why the plaintiff did not amend her pleadings. Though I agree with Mr. Omollo that it was fatal for the plaintiff not to join the proprietor of the particular portion where her interests lay, I will not hesitate but also blame the 1st defendant for the conundrum. In my considered view this action was intended to steal a match against the plaintiff.
25. Being bound by article 50 of the *Constitution* of Kenya on the right to fair hearing and audi alteram partem cardinal principle of law which provides that parties must be given an opportunity to be heard



before adverse orders can be made against them, this court cannot capriciously extinguish or cancel the said subdivisions. See the Court of Appeal decision of *Pashito Holdings Limited & another v Paul Nderitu Ndungu & 2 others* [1997] eKLR. It is my finding that at the time of hearing this suit, the suit property was nonexistent. I cannot render judgment on a nonexistent parcel of land. Despite this finding, it is paramount that I address the third issue.

III. Whether the plaintiff had proved that she was an adverse possessor

26. Some of the statutory underpinnings of the doctrine of adverse possession are set out in the *Limitation of Actions Act* and the *Land Registration Act*.
27. Section 7 of the *Limitation of Actions Act* intimates a proprietor cannot, after 12 years, recover land which had been acquired by adverse possession. section 13(1) of the said Act states an adverse possessor must be in possession of land in order for a right of adverse possession to arise. Section 13(1) of the same ACT states if adverse possession is interrupted, the period starts running afresh when the adverse possessor again takes possession of the land.
28. Section 17 states, “subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
29. Sections 38 (1) and (2) of the *Limitation of Actions Act* states “where a person claims to have become entitled by adverse possession to land, 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.”
30. Section 28 (h) of the *Land Registration Act* recognises all registered land is subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.
31. I agree with the decision of *Symon Gatutu Kimamo & 587 others v East African Portland Cement Co. Ltd (supra)* that the person seeking title, must prove the elements of adverse possession. The adverse possessor must also show possession was neither by force or stealth nor under the licence of the owner. The occupation must be adequate in continuity, in publicity and in extent, show possession was adverse to that of the title owner for a period of over 12 years.
32. In compliance with the provisions of Order 37 Rule 7(2), of the *Civil Procedure Rules*, which provides originating summons shall be accompanied by an extract of title, the plaintiff produced the green card for land parcel Uyoma/Kobong/269 which is a distinct parcel of land from the suit property. Though the two green cards alluded the two properties belonged to the deceased, they cannot be so.
33. The green card of the suit property that was produced by the defence demonstrates it was opened on June 29, 1987 while that of Uyoma/Kobong/269 was opened on July 1, 1991. The one that was produced by the defence is certified as a true copy while that produced by the plaintiff is not.
34. Two distinct parcel numbers cannot exist over the same parcel of land. The plaintiff’s copy was not certified and particulars thereof were in variance with her pleadings; in her pleadings her claim was on the suit property and not on Uyoma/Kobong/269. See the decision of this court in *National Bank of Kenya v Mary Awino Abiero (suing as the Legal Representative of the Estate of Everest Abiero Ameny & another; Colinet Auctioneers (Interested Party)* [2022] eKLR where this court held as follows;

“These registration sections are identified by distinctive names and may further be divided into blocks which have distinctive numbers or combinations of numbers and letters. The



name of the registration section, the number and the letter of the block is deemed sufficient reference to a particular parcel of land. This provision of law echoes the provision of section 18(3) and (4) of the repealed Registered Land Act}. What these provisions of law imply is that each parcel of land has a unique reference that is distinct from any other parcel of land.”

35. There was a dispute on the registration of the suit property. In his exam in chief, the 1st defendant was at pains to explain the disparity between the variance of the two green cards. It is my finding the extract that was produced by the plaintiff was not that of the suit property. Had I not made my findings issue no.2, I would have found the plaintiff had not complied with Order 37 Rule 7(2) of the Civil Procedure Rules by failing to tender an extract of the title or certificate of official search and would have dismissed her case. See the Court of Appeal case of Johnson Kinyua v Simon Gitura Rumuri Civil Appeal 265 of 2005 (Nyeri) [2011] KLR where the court expressed itself as follows;

‘Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act, and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate.’

36. Having evaluated the adduced evidence, considered the applicable law and for the reasons stated above, it is my ultimate finding the plaintiff’s suit was incompetent and I hereby dismiss it. It is trite law that costs follow the event and I award costs to the 1st defendant.

Delivered and Dated at Siaya this 26th 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

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