



REPUBLIC OF KENYA



KENYA LAW
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**Okello & another v Okello (Environment & Land Case 831 of 2017)
[2023] KEELC 536 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 831 OF 2017**

**MN KULLOW, J
JANUARY 23, 2023**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATIONS OF
ACTIONS ACT**

BETWEEN

RHODA AKINYI OKELLO 1ST PLAINTIFF

PEREZ BABU OKELLO 2ND PLAINTIFF

AND

MOLA OKELLO DEFENDANT

JUDGMENT

1. The Plaintiffs herein commenced this suit by way of an Originating Summons dated 18th September, 2017 and Amended on 16th November, 2021 against the Defendant for a determination of the following issues: -
 - i. A Declaration that the Defendant disposed a portion measuring 2 ½ Acres of L.R. No. North Sakwa/ Kamasoga/ 2031 to the Plaintiff herein, is barred under Limitations of Actions Act Cap 22 Laws of Kenya and his title over a portion measuring 2 ½ Acres in occupation/ use of the Plaintiff thereto, extinguished on the ground that the Plaintiff herein, has openly, peacefully and continuously been in occupation/ use and possession of the said portion measuring 2 ½ Acres for a period exceeding 40 years.
 - ii. There be an order that the Plaintiff be registered as the proprietor of the portion measuring 2 ½ Acres of land parcel L.R. North Sakwa/ Kamasoga/2031 that pending court order, and that this Honourable Court do move suo moto to order that the Plaintiff be the owner of 2 ½ Acres of the land thereof.



- iii. That the Defendant herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as the owner of the portion of L.R. No. North Sakwa/Kamasoga/ 2031 measuring 2 ½ Acres in default, the Deputy Registrar and/or Court Executive Officer be at liberty to execute all such necessary documents to give effect to the judgment and/or Decree of the court.
 - iv. Costs of the Originating Summons be borne by the Defendant.
 - v. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.
2. The Originating Summons is premised on the 11 grounds thereon and on the Supporting Affidavit sworn on even date. The Plaintiff avers that the Defendant sold to him a portion of the suit parcel measuring 2 ½ Acres sometimes in the year 1978 and he has been in actual possession, occupation and use of the said portion since then. It is his claim that the said possession, occupation and use has been peaceful and uninterrupted since the purchase and payment of the agreed consideration sum of Kshs. 2,000/=for over 40 years.
 3. He further avers that despite paying the agreed purchase price in full and taking possession of the said portion of the suit parcel; the Defendant has refused to have the said portion transferred ad registered in his name. He is apprehensive that since the Defendant holds the title deed and documents of the suit parcel; he may proceed to evict him and/or alienate the same to third parties.
 4. He thus urged the court to declare that he has since acquired ownership of the said portion by virtue of adverse possession owing to his exclusive, open, peaceful, continuous and uninterrupted possession, occupation and use of a portion of the suit parcel for more than 40years and order that the suit parcels be transferred and registered in his name.
 5. The Defendant entered Appearance through the firm of M/S Mudeyi Okumu & Co. Advocates dated 22.11.2017 and filed a Replying Affidavit sworn by the Defendant on 06.12.2017. It is his claim that the Plaintiff's claim of adverse possession cannot arise against him since he only became the registered owner of the suit parcel in the year 2006 whereas the Plaintiff alleges to have gained entry thereon in 1978.
 6. It is further his contention that the Plaintiff has unequivocally admitted that he has been denied access, usage and occupation of the suit land, which admission is a clear negation of the claim on adverse possession.
 7. He maintained that the claim of land under purchase is contractual and cannot be specifically performed for failure to obtain consent of the Land Control Board and further and without prejudice; that in the year 1978, he was a minor and thus not capable of executing any contract. Consequently, it is his claim that the sale agreement relied on by the Plaintiff made in 1978 is a forgery and fraud. He urged the court to dismiss the suit with costs.

Trial

8. On 05.03.2019; parties having failed to settle the matter outside court as proposed, the matter proceeded for hearing of the Plaintiff's case. The initial Plaintiff, Joel Okello Nyatuga, testified as PW1, he adopted his Supporting Affidavit sworn on 18/9/2017 as his testimony. He further maintained that he has been residing on the suit land since the year 1978; he has built on the said land and has been cultivating the same for the last 40 years.



9. He further stated that sometimes on 30/7/2017; the Defendant stopped him from cultivating 2 Acres of the suit land and only left him with ½ an Acre. The Plaintiff however died before the final determination of the suit and was substituted by the Rhoda Akinyi Okello and Perez Babu Okello.
10. He also produced his list of documents dated 18/9/2017 and marked as PExhibit 1 to 6 and the Further List of Documents dated 24/7/2018 and marked as PExhibit 7 and 8 as exhibits in support of his case.
11. On cross-examination he stated that he filed the suit in court after the defendant stopped him from using and forcefully took a portion measuring 2 Acres of the suit land and only left him with ½ an Acre where his homestead sits.
12. He further stated that he signed a contract for the sale of the suit land with the Defendant in 1978 and the defendant was 19 years at the time. He however conceded that no consent from the Land Control Board was obtained within the prescribed timelines for the transfer of the 2 ½ Acre purchased. It was his testimony that the Defendant secretly partitioned the suit land in the year 2006 and he became the registered owner of the suit portion as per Pexh 3. He explained that prior to 2006, the defendant was one of the owners of the suit land but he sold his share to him.
13. He however conceded that he filed the suit parcel in 2017 within 11 years after the registration of the suit parcel in the name of the defendant in the year 2006.
14. On re-examination he reiterated that he had lived on the entire 2 ½ Acre of the suit land peacefully and uninterrupted since 1978 until the year 2017 when the Defendant forcefully took away 2 Acres from the said portion. He further stated that Pexh 2 is proof that the defendant owned the land.
15. Rhoda Akinyi Okelo testified as PW2 on 24/2/2022; she adopted her witness statement dated 13/2/2022 as her testimony/ she further stated that she is the legal representative of the estate of the late Joel Okello and produced Pexh 7 as proof of the same.
16. She maintained that the suit parcel measuring 2 ½ Acres belonged to her husband having purchased the same from the defendant in the year 1978 and they have been in occupation thereon since 1978 to date. She however stated that they no longer cultivate the land because the defendant stopped them and forcefully took a portion measuring 2 acres of the suit parcel. She urged the court to allow their claim and grant them the land that her deceased husband had purchased.
17. On cross-examination; she reiterated that her late husband purchased the suit parcel from the Defendant and maintained that she wanted the court to enforce the sale agreement by granting them the entire 2 ½ Acre that was purchased.
18. Perez Babu Okello testified as PW3; she adopted her witness statement dated 13/2/2022 as her testimony. She restated that they have lived on the suit land since 1978 when the same was purchased and further that her late husband was also buried on the said land.
19. On cross examination, she maintained that the portion of land bought was measuring 2 ½ Acre and urged the court to grant the said portion. The Plaintiff thereafter closed their case.
20. The Defence case was adjourned to 20/09/2022. However, on the scheduled date, neither the Defendant nor his advocate on record was present in court. Since the Defendant was fully aware of the day's hearing date but chose not to attend court; I ordered that the Defence case be closed.
21. Upon close of the defence case, directions were issued on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision as hereunder;



Analysis and Determination

22. Having considered the pleadings, evidence adduced in court and the submissions filed herein; in my view, the issues arising for determination are as follows: -
- a. Whether the claim of Adverse Possession has been proved by the Plaintiff.
 - b. Whether the Plaintiff is entitled to the reliefs sought.

A. Whether the Claim of Adverse Possession has been proved by the Plaintiff.

23. The legal framework for adverse possession is provided for in various statutory provisions to wit; sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#).
24. Circumstances under which the title of a registered owner can be defeated by a claim of adverse possession were set out by the Court of Appeal in Peter Kamau Njau vs. Emmanuel Charo Tinga - Civil Appeal No. 29 of 2016 (unreported) as follows: -
- “A registered owner of land, may not, by the provisions of section 7 of the [Limitation of Actions Act](#) bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner’s title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner’s permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner’s enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”
25. It is the Plaintiffs’ claim that they have been in possession and occupation of the suit property since 1978; a sale agreement dated 26/2/1978 for a portion measuring 2 ½ Acres was made and was signed to that effect. However, despite taking possession and using the portion of the suit parcel, the Defendant failed and/or neglected to obtain the Land Control Board within the prescribed timelines for purposes of transferring the purchased portion. It is further their claim that the Defendant has since forcefully taken a portion measuring 2 Acres and they have only remained in occupation of ½ a portion hence the instant suit.
26. The Defendant on the other hand denied the Plaintiffs claim on adverse possession and stated that the suit was filed prematurely for the reason that he only became the registered owner of the suit property in the year 2006 hence at the time filing the suit herein, the alleged occupation and use was for a period of 11 years. It was also his position that the Plaintiffs use and possession was interrupted and the same is further confirmed by the Plaintiffs’ admission the he was denied access, usage and occupation hence the claim cannot arise. During cross- examination, the Defendant conceded that the Plaintiff are only entitled to the ½ an Acre portion which was rightfully given to them by his late mother and he was ready and willing to transfer the same to them.
27. Further, with regards to the purchase claims made by the Plaintiff; on the one hand he stated that in 1978 he was a minor thus incapable of executing a contract and on the other hand that the Plaintiffs’ claim is under purchase and the same cannot be specifically performed for failure to obtain the LCB Consent.
28. In view of the foregoing, it is clear that the Plaintiffs have been in possession, occupation and use of the suit parcel. What however appears to be in dispute is the portion occupied and whether



their occupation and use has been adverse to the Defendant's rights over the same land to warrant registration of the Plaintiff as the owners thereof. Both parties have taken rival positions in relation to the portion occupied and on the issue of adverse possession.

29. The starting point will be on the alleged sale of land claim and whether the said sale is still valid and capable of execution. The Defendant contends that at the time of the alleged sale in the year 1978 he was a minor and hence incapable of executing a contract. The Plaintiff during cross-examination stated that the Defendant was 19 years at the time of the contract. However, he did not produce any exhibit in support of these averments. Further, no copy of identification Card of the Defendant has been produced as exhibit by either party to enable this court ascertain the Defendant's age at the time of the alleged sale. The Law on Contract is clear with regards to the capacity of a party in contractual engagement. To this end, I find that the said contract for sale of land is null and void for reason of capacity to contract hence the same is unenforceable and cannot be relied on in the dispute herein.
30. I will now proceed to analyse the claim on adverse possessions and whether the Plaintiff has met the required principles in proving the same. It is well settled that the starting point in a claim for adverse possession is the title of the owner of land which seeks to be dispossessed; an Applicant must acknowledge the title and ownership of the suit parcel and demonstrate that the same belongs to the Defendant. In other words, one cannot dispossess and/or acquire adverse rights against an owner of a land, where the title of such a person/owner is in dispute.
31. I have looked at Pexh 2 which is a copy of the title of the suit title and the same is proof that the Defendant became the registered owner of the suit parcel in the year 2006. On cross-examination of the Plaintiff, it was his contention that at the time of the purported sale of land, the Defendant was one of the joint owners of the said parcel of land and he sold to him his portion. He avers that sometimes in the year 2006 the Defendant secretly partitioned the suit land and became the registered owner thereof. However, I have noted that there was no proof of the said averments of joint ownership made in the plaint. No document or copy of the Green Card was produced by the Plaintiffs to show who the joint owners were or whether the defendant was one of the said joint owners at the time of the alleged purchase in the year 1978.
32. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -
“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
33. In the absence of sufficient proof, the said averments by the Plaintiffs remain unsubstantiated claims with no probative value. It is therefore impossible for this court to ascertain who was the holder of title and/or owner at the time of the purchase. For prescriptive and overriding rights, which are adverse to the rights and interests of the owner of land to accrue; the owner and/or registered title holder of the suit land must be clearly distinguishable and/or identifiable. It is only upon clearly identifying the holder of the title that the claim of adverse possession can run against the holder of such title, his estate and/or assigns. In view of the above, it is my finding that the Plaintiffs have not satisfactorily proved the 1st limb on the ownership and/or title of the suit parcel.
34. Secondly, an Applicant must prove that their possession and occupation of the suit parcel was open, continuous and uninterrupted for a period of 12 years and when the said possession and occupation became adverse. In this case, the Defendant became the registered owner of the suit land in the year 2006 and despite the said registration, the plaintiff continued occupying and using the suit parcel measuring 2 ½ Acres. However, it is their claim that the defendant forcefully took a portion of the suit parcel measuring 2 Acres in the year 2017 hence the instant suit.



35. From the time of the said registration of the sui parcel in the name of the Defendant to the time of the alleged interruption in 2017, the period of occupation was 11 years. To this end, I agree with the Defendant that the Plaintiffs' claim was filed prematurely. The statutory period of 12 years had not materialized to warrant the reliefs sought of adverse possession. At the time of filing the suit; the Plaintiffs' had not acquired rights and overriding interests over the suit property against the rights of the Defendant as the registered proprietor of the suit land.
36. In view of the foregoing, I find and hold that the Plaintiffs has failed to sufficiently prove their claim on adverse possession over the 2 Acre portion of the suit parcel L.R. No. North Sakwa/Kamasoga/ 2031 on a balance of probabilities to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

37. Having failed to sufficiently prove his claim to the required threshold, I find that the Plaintiffs are not entitled to the reliefs sought in the Amended Originating Summons save for the ½ an Acre which is not in dispute.

Conclusion

38. The upshot of the above is that the Plaintiff has not proved his claim on adverse possession on a balance of probabilities for the 2 Acres portion of the suit parcel and I accordingly dismiss the Amended Originating Summons dated 16th November, 2021 to the extent of the 2 Acres.
39. However, I hereby order the Plaintiff to keep the undisputed ½ an acre which they have been using and which the Defendant acknowledged that was rightfully given to the them. The Defendant is hereby directed to execute transfer instruments in relation to the ½ an acre for purposes of transfer and registration of the said portion in the Plaintiff's name within 45 days from the date hereof. In default, the Deputy Registrar is hereby directed to effect the said transfer instruments for purposes of transfer and registration in the Plaintiffs names.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 23RD DAY OF JANUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Plaintiffs

Nonappearance for the Defendant

Court Assistant- Tom Maurice/ Victo

