



**Okute v Andati (Environment & Land Case 617 of 2014)  
[2023] KEELC 142 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 142 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 617 OF 2014  
DO OHUNGO, J  
JANUARY 24, 2023**

**BETWEEN**

**REX OMITO OKUTE ..... PLAINTIFF**

**AND**

**VINCENT FESTUS AMBASU ANDATI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court through Originating Summons (OS) dated 21<sup>st</sup> September 2010. He averred that he is the owner of the parcel of land known as Kisa/Khushiku/1180 (the suit property) by adverse possession. He therefore sought determination of the following:
  - a. Whether the Plaintiff has been in open, continuous and peaceful adverse possession of the above parcel of land for more than 12 years to date.
  - b. Whether the interest of the Defendant and or his agents and or his assignees as a registered owner of the said parcel of land has been extinguished by the Plaintiff's adverse occupation of the said land.
  - c. Whether the Plaintiff should be registered in place of the Defendant as the owner of the said land.
  - d. Whether the Defendant should be ordered to transfer the whole of the said land to the Plaintiff within a time to be specified by the court and in default the Deputy Registrar of this court to execute all the necessary documents to effect the transfer of the said parcel of land to the plaintiff.
  - e. Whether the costs of this originating summons should be provided for.



2. The OS was supported by an affidavit sworn by the plaintiff. The defendant responded to it through a replying affidavit which he swore and filed on 8<sup>th</sup> November 2010.
3. The hearing of the matter proceeded by way of oral evidence. The parties testified in support of their respective cases and did not call any additional witnesses.
4. The plaintiff testified that the suit property was initially registered in the name of Omito Namugunda who was a brother to the plaintiff's grandfather. That Omito Namugunda had only two children: Risper Matendechere and Eliseba O. Alunya who were both girls. That the plaintiff was born on the suit property in 1970 and lived on it until 1981 when his father passed away and 2005 when his mother passed away in 2005. That Omito Namugunda passed away in 1968, a year after gifting the suit property to the plaintiff's but before formally transferring it to the plaintiff's father. The plaintiff added that both his parents were buried on the boundary of the suit property and the parcel of land known as Kisa/Khushiku/1181. That after his parents passed away, he continued using the suit property until 2009 when Eliseba called for a family meeting and told the meeting that the land where the plaintiff was cultivating belonged to her father and that the plaintiff should pay her something for it. That the family agreed that the plaintiff pays Eliseba KShs 40,000 for the plot, as a result of which he paid her a total of KShs 33,000 with the knowledge of the local assistant chief.
5. The plaintiff went on to state that the assistant chief called telephoned him in June 2009 and told him that the suit property had been sold by Eliseba to the defendant. That the defendant also called the plaintiff and told him that the plot was his. He added that the assistant chief arranged a meeting between him, the defendant and the extended family. That he obtained a copy of the green card for the suit property and that it shows that the first owner was Omito Namukunda and that the defendant became registered owner on 6<sup>th</sup> November 2009 through succession.
6. The plaintiff further testified that later, the defendant approached Eliseba for a refund and that Eliseba approached the plaintiff following which Eliseba and the defendant agreed at a family meeting held at the Chief's office on 27<sup>th</sup> October 2017 that the defendant was to be refunded KShs 265,000 and that the plaintiff would pay the money. That Eliseba and the defendant signed a written agreement dated 27<sup>th</sup> October 2017. That the defendant gave his account number through which the funds were to be deposited and that he proceeded to deposit a total of KShs 265,000 in the defendant's bank account. He added that they settled the dispute and that the defendant was to hand over and transfer the suit property to him. That the defendant entered the suit property on 21<sup>st</sup> September 2010 and voluntarily vacated it on 19<sup>th</sup> September 2018, the same day that he paid the defendant the final instalment. That despite vacating the suit property, the defendant has not transferred it to him. The plaintiff's case was closed at that point.
7. The defendant testified next and adopted his replying affidavit which he swore and filed on 8<sup>th</sup> November 2010 as his evidence in chief. He stated in the affidavit that Eliseba sold her interest in the suit property to him through sale agreement dated 6<sup>th</sup> March 2008 and consented to him filing succession proceedings on her behalf. That he assumed possession of the suit property from Eliseba and started using and that sometime in 2008, he was assaulted and suffered serious head injury which led to his admission in hospital from 27<sup>th</sup> November 2008 to 1<sup>st</sup> December 2008. That while he was in hospital, the plaintiff approached Eliseba and tried to persuade her to give her KShs 40,000 to refund to the defendant but Eliseba refused. That after confirmation of the grant, the suit property was transferred to the defendant in November 2009 after long he took possession of it in 2008.
8. The defendant went on to state that prior to the filing of this case, the suit property had proceedings, summons and various sittings in which the plaintiff was looking for ways of evicting him. He added



that on 9<sup>th</sup> June 2009, he was summoned by the Assistant chief to appear before him on 16<sup>th</sup> June 2009 to have the dispute determined. He also testified that the provincial administration conducted a hearing over the suit property on 3<sup>rd</sup> July 2009 and added that the plaintiff has never lived on the suit property. Under cross examination, he stated that he constructed a toilet on the suit property in 2009, that the suit property was not occupied and that he was cultivating it without residing on it as at the date of his testimony. He stated that he signed the agreement with Eliseba where he was to be refunded KShs 265,000 and that he has not refunded the money which he received into his account. The defence case was closed at that point.

9. Parties thereafter filed and exchanged written submissions. I have carefully considered the pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
10. The law and principles relating to adverse possession are well settled and are founded on Sections 7, 13, 17 and 38 of *Limitation of Actions Act*. With those provisions in mind, the Court of Appeal observed in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015]* eKLR as follows:

From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. ... Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.

11. The plaintiff's own testimony is that the defendant entered the suit property on 21<sup>st</sup> September 2010 and voluntarily vacated it on 19<sup>th</sup> September 2018. It should be noted that this suit was filed on 21<sup>st</sup> September 2010. On his part, the defendant testified that he took possession of the suit property in 2008 after buying it and that he constructed a toilet on the suit property in 2009. The defendant further testified that prior to the filing of this case, there were disputes between him and the plaintiff over the suit property before the provincial administration including summons by the Assistant chief to appear before him on 16<sup>th</sup> June 2009 and a hearing on 3<sup>rd</sup> July 2009. He produced documents to support these claims. In those circumstances, I am not persuaded that the plaintiff had peaceful occupation or that the defendant did not assert his ownership of the suit property.
12. It is trite that a person claiming adverse possession must prove possession which is unbroken during the entire period of at least 12 years. In this case, the plaintiff has failed to prove possession. His own evidence shows that the defendant was in possession on the date he filed this case. Even if he had demonstrated possession, his own evidence shows clearly that he acknowledged the defendant's title on 27<sup>th</sup> October 2017 when he agreed to refund the defendant the purchase price. The Latin maxim of nec vi, nec clam, nec precario has not been met.
13. In view of the foregoing, the plaintiff has not established adverse possession and the reliefs sought cannot issue. Consequently, I dismiss the plaintiff's case with no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JANUARY 2023.**

**D. O. OHUNGO**



## **JUDGE**

Delivered in open court in the presence of:

Ms Aligula holding brief for Mr Amasakha for the plaintiff/applicant

The defendant/respondent present

Court Assistant: E. Juma

