



REPUBLIC OF KENYA



**Magwanga & another v Aluoch (Environment & Land Case  
E18 of 2020) [2023] KEELC 508 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 508 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E18 OF 2020  
E ASATI, J  
JANUARY 19, 2023**

**BETWEEN**

**HELLEN AWELLE MAGWANGA ..... 1<sup>ST</sup> APPLICANT**

**ALFRED OKOTH OLANG' ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GRACE ROMBO ALUOCH ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Vide the originating summons dated October 21, 2020, stated to be brought pursuant to the provisions of order 37 rule 7 *Civil Procedure Rules* and section 28 (h) of the *Land Registration Act*, No 3 of 2012, sections 7, 13(1), 17,37 and 38 of the *Limitation of Actions Act*, the applicants who claim to be entitled to all that land known as Kisumu/Wathorego/2449(the suit land herein) by adverse possession seek the following orders against the respondent: -
  - a. That the applicants be declared to have become the legal owners entitled by adverse possession of over twelve years since 1994 all that parcel of land comprised in title number Kisumu/wathorego/2449.
  - b. The Registrar of Lands within Kisumu County be directed to enter the names of the applicants, beneficiaries or their legal assigns in the register as the sole proprietors of the said parcel of land namely Kisumu/Wathorego/2449 in place of the Respondent in whose name the land is currently registered.
  - c. The Respondent be permanently barred from interfering with peaceful possession of the applicant
  - d. Costs of this application be borne by the Respondent.



2. No response to the Originating Summons was filed. An Affidavit of service sworn on December 14, 2020 by one Moses Omondi Ogada a court process server shows that attempts to serve the Respondent with the Originating Summons, Verifying Affidavit, Plaintiff's list of documents, Plaintiff's list of witnesses and Plaintiff's Statement physically on October 24, 2020 and 8/12/2020 were futile. Consequently, the applicant filed an application vide Notice of Motion dated December 13, 2020 seeking for orders that service upon the Respondent be by way of substituted service. The application was allowed vide court order dated December 16, 2020.
3. Vide an application dated June 8, 2022, the applicant sought for directions, inter alia, that the suit proceeds by way of affidavit evidence. Justice AO Ombwayo allowed the application on 27/9/2022.

### **Summary of the evidence**

4. The evidence placed before the court by the Applicant comprised of the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant on October 20, 2020 to which the applicants attached exhibits namely; certificate of official search in respect of Kisumu/wathorego/2449. It shows that the suit land measuring 0.20 Hactares was registered in the name of the Respondent on November 29, 1994. They also annexed photographs showing a house and some trees. The 1<sup>st</sup> applicant deposed that the suit land is registered in the name of the Respondent. That she got married to Victor Magwanga who inherited the suit property from his father. That it was in the year 2020 that she discovered that the suit land was in the name of the Respondent having been so registered in 1994 during land adjudication either by mistake, fraud or whatever other reasons. That she subsequently reported the matter to the area chief and assistant Chief. She further deposed that before and after the registration of the suit land in favour of the Respondent, she was in open, peaceful, notorious and continuous occupation of the suit land. That she built a home for the 2<sup>nd</sup> Applicant whom she describes as her orphan grandchild on the suit property, planted trees round the parcel and have continuously cultivated on a section of the same. She annexed photographs to show the developments on the suit land. That by reason of her possession of the suit land together with the 2<sup>nd</sup> applicant, the Respondents title to the suit land has been extinguished by effluxion of time.
5. William Audo Odiyo in his Affidavit sworn on October 27, 2022 deposed in support of the Applicant's case that between the years 1990 and 2006 he was a village elder of Angira B village where the suit land is situated. That the 1<sup>st</sup> applicant is the wife of Victor Magwanga Oguda who died in 1992. That the deceased and 1<sup>st</sup> applicant started living in the suit land in the 1940s. that although he has lived in Angira B village for over 60 years he has never seen or heard of the registered owner of the suit land, the Respondent herein. That the 2<sup>nd</sup> applicant has grown up on the suit property since the 1980s.
6. The Applicants also relied on the contents of the affidavit of Erastus Ajwang Okumu sworn on October 27, 2022. The contents are almost similar to the Affidavit of William Audo Odiyo. He stated that although he is an elder in Angira village where the suit land is situate, he has never met the Respondent and does not know her. That he was surprised to find that the suit land is registered in the name of the Respondent yet the late Victor Magwanga, the 1<sup>st</sup> applicant's husband inherited the property from his father. That when the applicants informed him that they wanted to lodge a complaint at the lands registry he referred them to the area chief to write for them a letter of introduction.
7. The 2<sup>nd</sup> applicant swore an affidavit on October 27, 2022. He stated that he was born in the year 1980 and has been brought up by the 1<sup>st</sup> applicant as he was an abandoned child. That sometime in the year 2019 some strangers came to inspect the suit land- and subsequently, he and the 1<sup>st</sup> applicant discovered that the land was registered in the name of the Respondent herein and they filed the current suit. The



2<sup>nd</sup> applicant prayed that the suit be allowed since him and the 1<sup>st</sup> Respondent had occupied the land for a period in excess of 12 years.

### Determination

8. Where a Defendant fails to file defence, adduce evidence in support of the Defence and to attend court to prosecute the case, the Plaintiff's evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination. It therefore stands unchallenged and uncontroverted. However, the Plaintiff does not escape the burden and standard of proof which he has to satisfy and discharge in accordance with the law in order for his claim to succeed. See sections 107(1), 108 and 109 *Evidence Act* cap 80 laws of Kenya.

9. In the case of *Charter House Bank Limited (Under statutory management) v Frank N Kamau* [2016] eKLR the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

"we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified"

10. In the present case, the plaintiff has the burden to adduce some credible and believable evidence to prove on a balance of probabilities that she has acquired the prescriptive rights. That her possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure v Swift Rutherford & Co Ltd* [1980] KLR 10 Kneller, J held that

"the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)

11. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR adverse possession was defined as

"..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it."

In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR the court of Appeal defined adverse possession as:

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against



such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

12. The Plaintiff’s claim is based on the doctrine of adverse possession. Their uncontroverted evidence is that they have had occupation and use of the suit land for a period in excess of twelve years. That the occupation has been open, exclusive, notorious, peaceful and uninterrupted with the knowledge but without the permission of the registered owner, the Respondent herein.
13. Adverse possession is a doctrine of law *vide* which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on section 7, 13 and 38 of the [Limitation of Actions Act](#). Section 7 provides that:

“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.”

Section 13 of the [Limitation of Actions Act](#) provides:

- (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 this Act referred to as adverse possession), 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 cease 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 purpose 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.

The procedure for seeking relief on a claim based on adverse is provided for in section 38 of the [Limitation of Actions Act](#) and order 37 of the [Civil Procedure Rules, 2010](#)

14. The Plaintiffs’ evidence is uncontroverted. They have demonstrated that the suit land is registered in the name of the Defendant. A certificate of official search dated October 23, 2020 was annexed to the Supporting affidavit. It shows that the suit land No Kisumu Wathorego/2449 measuring 0.20 Hactares was registered in the name of the Defendant on November 29, 1994. They have also demonstrated that they have occupied the suit land for a period in excess of 12 years and that their activities on the suit land have been inconsistent with the interest of the Defendant registered owner. That their occupation of the land has been exclusive, open, and continuous.
15. On the basis of the uncontroverted evidence I find that the applicants have proved their case on a balance of probabilities. I enter judgement in favour of the applicants for: -
  - a. A declaration that the applicants have acquired title to the suit land by adverse possession



- b. A declaration that the respondent's title to the suit land has been extinguished by effluxion of time
- c. An order that the respondent forthwith transfers the suit land to the applicants jointly and in default the Deputy Registrar of this court to sign the requisite forms so as to effect the transfer.
- d. Each party to bear own costs

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E ASATI**

**JUDGE**

**In the presence of:**

Maureen: Court Assistant.

Jeji advocate for the applicants.

No appearance for the Respondent.

