



**Ogak v Auma & another (Environment & Land Case 11 of 2021)
[2023] KEELC 65 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 65 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 11 OF 2021
AY KOROSS, J
JANUARY 19, 2023**

BETWEEN

ANGECH OBIERO OGAK PLAINTIFF

AND

EUNICE AUMA 1ST DEFENDANT

SELLAH AKINYI OKWAKO 2ND DEFENDANT

JUDGMENT

Introduction

1. By an originating summons dated 6/09/2016, the plaintiff instituted suit against the defendants; his father Anyore Ogak [deceased] and the 1st defendant's father Obiero Ogak alias Alfred Angech [deceased] were brothers.
2. Obiero Ogak alias Alfred Angech [hereinafter 'Alfred'] was the registered proprietor of land parcel number North Ugenya/Simur/2497 hereinafter referred as the "mother parcel" which was transferred to the 1st defendant on 9/8/2011. On 16/7/2014, the 1st defendant divided it into two portions; North Ugenya/Simur/3049 that is still registered in her name and North Ugenya/Simur/3050 that was sold to the 2nd defendant who in the course of these proceedings, subsequently sold it to Western Zone Christian Union Self Group. These two portions shall hereinafter be referred as the "suit properties". He sought several reliefs against the defendants: -
 - a. That he be declared the absolute owner of the suit properties;
 - b. The defendants be ordered to execute all documents of transfer in respect of the suit properties in his favour, failure of which, the deputy registrar be empowered to execute them on behalf of the defendants;



- c. The defendants, their agents, servants and or workers be restrained permanently by an order of injunction from selling, transferring, fencing off, further subdividing and or in any manner whatsoever interfering with the suit properties;
 - d. The defendants be ordered to give vacant possession of any part of the suit properties that they may be occupying; and
 - e. Costs to the plaintiff.
3. The summons was supported by the affidavit of the plaintiff in which he deposed, inter alia, he had been in actual, open, notorious and uninterrupted use of the suit properties even prior to their subdivision for a period of over 30 years; the subdivision was conducted fraudulently without his knowledge or consent and the defendants had declined to transfer the suit properties to him and intended to alienate it.
4. By the firm of Atego & Associates, the defendants filed a notice of appointment of advocates dated January 18, 2022. On diverse dates of 21/2/2022, 23/3/2022 and 25/5/2022, the court accommodated the defence counsel to file his pleadings but he failed to comply.
5. The hearing date of 27/7/2022 was taken in the presence of the defence counsel but in the absence of the plaintiff's counsel. On the hearing date of 27/7/2022, the plaintiff's counsel proceeded with the plaintiff's case and both the plaintiff's case and defence case were marked as closed. The defence counsel and 1st defendant did not attend court on the hearing date. However, the 2nd defendant attended court on the said date and after the close of the parties' case, she sought for time to put in her pleadings; the court declined to accede to her application.
6. On September 29, 2022 which was long after the close of the case, the defendant's counsel filed the 1st defendant's witness statement and list and bundle of documents.

Plaintiff's evidence

7. The plaintiff testified as PW1, he adopted the averments deposed in his supporting affidavit and this court need not recap them. He testified that, he was born in the year 1942 and his father died in 1943. Upon his father's demise, Alfred raised him and lived with him as his own son to the date of his demise on 5/05/1995. Upon Alfred's demise, he continued using the suit properties. He had lived on the suit properties peacefully from 1942 to the date of filing suit and the subsequent subdivision had not interfered with his occupancy. Alfred sired four daughters only one of whom was surviving; the 1st defendant. He produced several green cards and Alfred's death certificate in support of his case. In answer to a question from the court, he testified that none of the defendants utilized the suit properties but an unknown person had constructed on it.
8. PW2, Michael Oloo Odhiambo adopted his witness statement dated February 16, 2018. He corroborated the plaintiff's testimony. He was a nephew to the plaintiff; the plaintiff's father and Alfred were siblings with his grandparents. He had known the plaintiff from the year 1949 and he had seen him utilizing the suit properties from 1971. He testified that prior to Alfred's death, the plaintiff and his family had utilized the suit properties. The 1st defendant intimated to him in the year 2011 that she had acquired title to the mother parcel and he notified her that the mother parcel belonged to the plaintiff. According to him, the plaintiff acquired Alfred's name because he [Alfred] treated him as a son.



9. PW3, Samuel Ochanda Auma, a retired assistant chief corroborated the plaintiff's testimony. He testified that he lived about 2kms away from the suit properties and the plaintiff acquired them from Alfred. He was not privy to the current dealings of the suit properties.

Plaintiff's written submissions.

10. As directed by the court, the plaintiff's counsel Mr. Ashioya filed his written submissions dated 5/10/2022.
11. Counsel submitted that the plaintiff's evidence and those of his witness were consistent and not controverted by the defendants. Counsel placed reliance on the case *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR where J.G.Kemei J stated: -

'In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts' Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported).'

12. He also relied on the decision of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased))* [2022] eKLR where L. Gacheru J expressed herself as follows;

'A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal, (Wanje v Saikwa (No 2) [1984] KLR 284).'

13. Counsel submitted that the plaintiff had proved his case on a balance of probabilities and prayed for judgment in his favour with costs.

Analysis and determination

14. I have considered the plaintiff's pleadings, evidence and written submissions and in my considered view, the issues falling for determination are;
- (i) whether this court can make adverse orders against the registered proprietor of North Ugenya/Simur/3050
 - (ii) whether the defendants witness statements and list and bundle of documents were properly on record
 - (iii) whether the plaintiff had proved that he was an adverse possessor
 - (iv) what appropriate orders should be granted? and
 - (v) who should bear the costs of this suit?

I. Whether this court can make adverse orders against the registered proprietor of North Ugenya/Simur/3050

15. The plaintiff filed suit against the defendants in the year 2016 but for some reason, the court file was unavailable and or missing and consequently, the court on March 11, 2019 reconstructed the file. All the while, the 2nd defendant in total defiance with the doctrine of lis pendes callously sold North



Ugenya/Simur/3050 to Western Zone Christian Union Self Group. It is evident from the green card adduced by the plaintiff that the transfer to this 3rd party took place on 17/8/2017.

16. The actions of the 2nd defendant was 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 as to do otherwise would lead to a situation where the plaintiff would be liable in every case to be defeated by the defendants by alienating the suit property before the judgment or decree is rendered, and would be driven to commence his proceedings de novo subject again to be defeated by the same course of proceedings. 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"

17. It is unfortunate that the plaintiff did not seek to amend his pleadings to include this new purchaser Western Zone Christian Union Self Group because had he done so, the court would not have hesitated but joined it in these proceedings. From the evidence adduced, he seems not to have been aware of such a new development and this might explain why he testified that some unknown party had built on the suit properties. Had he not overlooked the green card that he adduced in his evidence, he would have probably established who the mysterious 3rd party was.
18. I am of the considered view that in interests of justice, the 2nd defendant's action should not be used to defeat the plaintiff's action against the 1st defendant.
19. Being bound by article 50 of the *Constitution of Kenya* on the right to fair hearing and audi alteram partem cardinal principle of law that 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 purchaser's title to North Ugenya/Simur/3050. See the Court of Appeal decision of *Pashito Holdings Limited & another v Paul Nderitu Ndungu & 2 others* [1997] eKLR. I sympathize with the plaintiff but my hands are tied and it is my finding that I cannot enter judgement against Western Zone Christian Union Self Group which is the registered proprietor of North Ugenya/Simur/3050.

II. Whether the defendants witness statements and list and bundle of documents were properly on record

20. As earlier stated, the defendants in contravention with the provisions of Orders 7 Rule 5 and 37 Rule 19 (3) of the Civil Procedure Rules, filed a witness statement and list and bundle of documents after the parties' case was closed. Worse is, averse to the requirement that these documents must be anchored on a pleading, from the court record, no replying affidavit was ever filed in opposition to the plaintiff's



claim. The proceedings of this court have not been set aside. Once the parties' case was heard and closed, the suit was ripe for judgement. Order 21 Rule 1 of the Civil Procedure Rules provides as follows;

'In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates...

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.' Emphasis added

It is my finding that these documents were improperly in the court record and I hereby strike them out.

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

21. 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.
22. Section 7 of the Limitation of Actions Act intimates that a proprietor cannot, after 12 years, recover land that had been acquired by adverse possession. Section 13(1) of the said Act states that 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 that if adverse possession is interrupted, the period of adverse possession starts running afresh when the adverse possessor again takes possession of the land.
23. Section 17 states that,

“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”.
24. Sections 38 (1) and (2) of the Limitation of Actions Act states that

“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”.
25. Section 28 (h) of the Land Registration Act recognises that 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 the limitation of actions or by prescription.
26. The Court of Appeal in the case of Mtana Lewa v Kabindi Ngala [2015] eKLR held as follows on the doctrine of adverse possession: -

“The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth or 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”. Emphasis added
27. I agree with the decision of Wilson Njoroge Kamau v Nganga Muceru Kamau (*supra*) that when dealing with a claim of adverse possession, the primary function of the court is to draw legal inferences from proved facts and such inferences are clearly matters of law. I will now proceed to juxtapose the facts of this case to the established legal framework.



28. Though there was contradiction of when the plaintiff entered the suit properties, the witnesses gave clear, concise and unshaken testimony. They both remained consistent that the plaintiff had been in occupation of the suit properties for a long period of time. Their testimony was not controverted.
29. The plaintiff testified that he was born on the suit properties in the year 1942. Meaning that by the time he filed suit in the year 2016, 74 years had lapsed yet in his supporting affidavit, he deponed that he had been in occupation for 30 years. PW2 testified that the plaintiff had been utilising the suit property from the year 1971. The import of this testimony was that the plaintiff had been in occupation of the suit properties for 45 years.
30. This court is uncertain of the exact time the plaintiff entered the suit properties and will take the year 1986 as the year the plaintiff entered the suit property. This is the latest period from all the periods of time that were asserted by the witnesses. The year 1986 was 30 years to the time the suit was filed. Was the plaintiff's occupation with permission of Alfred?
31. It was undisputed that the plaintiff entered the suit properties with the consent of Alfred. Such a consent would negate the plaintiff's claim of adverse possession. The plaintiff's possession had to have been without permission of the owner. The plaintiff produced Alfred's death certificate which proved Alfred died on 5/5/1995. Upon his death, the consent ceased and the plaintiff's entry and claim of adverse possession started to accrue which would be 21 years to the time he filed suit.
32. There was no evidence to contradict his testimony that his possession for those 21 years was open, without force, without secrecy or with permission. There was no evidence that the 1st defendant issued a consent to the plaintiff, took possession or ousted his possession. I place reliance on the persuasive decision of *Partridge v Wallbank* 150 Eng Rep 1021 (1220-1865) which cited the case of *Doe d Parker v Gregory* (2 Ad & E 14; 4 Nev & M 308) where the court stated;

‘where a widow, tenant for life of lands settled upon her by a deceased husband by way of jointure, married again, and levied a fine of the lands jointly with her second husband, and died, and the husband held for more than twenty years after her death, it was held that his possession was adverse against the reversioner after her death, although he had originally come into possession lawfully, because he could have been treated as a trespasser immediately on the wife's death’.
33. The transfer of the mother parcel to the 1st defendant upon the demise of Alfred did not amount to an assertion of her rights over the mother parcel and time continued running. The plaintiff's right accrued 12 years from Alfred's demise. Though these facts demonstrate that the plaintiff had some appearance or colour of title over North Ugenya/Simur/3049. There is more.
34. I have agonised over the 3rd party's occupancy of either North Ugenya/Simur/3049 or North Ugenya/Simur/3050. It is unfortunate the plaintiff did not disclose the identifiable portion of land that he occupied. It was evident that the plaintiff was in occupation together with an undisclosed 3rd party; it was not disclosed whether this 3rd party occupied North Ugenya/Simur/3049 or North Ugenya/Simur/3050.
35. Though I empathise with the plaintiff, I am bound by settled legal principles. It behoved upon the plaintiff to prove the size of the specific portion that he was in exclusive occupation and possession of; which he did not. On that basis, I am unable to find that the plaintiff did prove that he was in exclusive occupation of North Ugenya/Simur/3049 or that he was in exclusive occupation of a particular portion of it. Had he disclosed the identifiable portion, I would not have hesitated but to



find in his favour on the specific portion. I place reliance on the decision of *Githu v Ndele* [1984] KLR 776 where the court held that;

‘The identification of the land in possession of an adverse possessor is important and intergral part of the process of proving adverse possession’

36. It is trite that the acreage of the land being claimed must be specifically ascertained and the burden of proof was on the plaintiff who laid a claim of adverse possession. The Court of Appeal decision of *Gerishon Muindi Barutbi v Willays Gatinku Mukobwa & another* CA No 98 of 1998 was cited with approval in the case of *Charles Mwangi Kiiru & 2 others v Boniface Maina Gichomo & another*; [2021] eKLR. In Gerishon’s case, the court held thus;

‘Exclusive possession of a portion of parcel of land which is definite would entitle the appellatant to establish his claim on ground of adverse possession provided the period of 12 years has run’

37. For the reasons stated earlier, I shall not make a finding on North Ugenya/Simur/3050 which was a subdivision of the mother parcel.
38. Having evaluated the evidence adduced and considered the applicable law, I find that the plaintiff did not prove his case on a balance of probabilities to enable this court declare that he had acquired title to North Ugenya/Simur/3049 by virtue of being in adverse possession.
39. What orders should this court grant? For the foregoing reasons and findings, I dismiss the Plaintiff’s claim of adverse possession and because it is trite law that costs follow the event and considering the plaintiff and 1st defendant are close family relations, Each party shall bear their respective costs.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JANUARY, 2023.

HON AY KOROSS

JUDGE

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

