



Okombo (Suing as the Legal Administrator of the Estate of the Late Okombo Okwiri –Deceased) v Karaka (Environment & Land Case 3 of 2022) [2023] KEELC 183 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 183 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 3 OF 2022
MN KULLOW, J
JANUARY 19, 2023
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22
LAWS OF KENYA
AND
IN THE MATTER OF A CLAIM OF ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATIONS OF
ACTIONS ACT
AND
IN THE MATTER OF L.R. NO. NORTH SAKWA/KADERA
LWALA/61
BETWEEN
CHARLES OBUNGA OKOMBO (SUING AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF THE LATE OKOMBO OKWIRI –DECEASED) PLAINTIFF
AND
AWIDHI KARAKA ALIAS JOSIAH AWIDHI KARAKA DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated February 17, 2022 against the Defendant for a determination of the following issues: -
 - I. This honourable court be pleased to declare that the Plaintiff and any other person claiming under him has acquired by way of Adverse Possession a portion measuring approximately 1.2Ha (3 Acres) of L.R. No. North Sakwa/ Kadera Lwala/61.



- II. This honourable court be pleased to declare that the Plaintiff is the owner of a portion of L.R. No. North Sakwa/ Kadera Lwala/ 61, measuring approximately 1.2Ha (3 Acres) to the exclusion of the defendant.
 - III. This honourable court be pleased to Order for the Transfer of a portion measuring approximately 1.2Ha (3 Acres) of L.R. No. North Sakwa/ Kadera Lwala/61 and that the same be registered into the plaintiff's name.
 - IV. The defendant be ordered and/or directed to execute and/or sign all the necessary transfer instruments/ documents and facilitate the Transfer and registration of the suit property into the names of the plaintiff in default of which the Deputy Registrar to execute the same in order to facilitate the Transfer.
 - V. This honourable court be pleased to order the defendant to bear the costs of this suit.
2. The Originating Summons is premised on the 12 grounds thereof and on the plaintiff's supporting affidavit sworn on even date. The Plaintiff is the legal administrator of the estate of the late Okombo Okwiri and hence a beneficial owner of the suit parcel. He avers that his late father bought a portion of the suit parcel measuring approx. 1.2Ha (3 Acres) from the defendant herein on June 28, 1978. That the defendant signed the sale agreement and subsequently signed the Application for consent of Land Control Board in the year 1980; but has since refused to effect transfer of the purchased property to his father or his estate todate, despite the several attempts and pleas to have him do the same.
 3. It is his contention that despite the suit portion of land being registered solely in the name of the defendant; the entire family of the late Okombo Okwiri have peacefully and without any interference occupied the portion of land measuring approx. 1.2Ha (3 Acres) for a period of more than 40 years which period exceeds the statutory period of 12 years for a claim of adverse possession and he attached bundle of photographs as proof of their occupation and use thereof.
 4. He now contends that as a result of the said long, open, continuous and uninterrupted occupation and use of the said portion for over 12 years, the family of the late Okombo Okwiri has acquired ownership and overriding rights of the suit parcel by virtue of adverse possession of the suit property. He thus urged the court to allow his claim and have the portion transferred and registered in his name.
 5. He further added that the defendant has never taken any legal steps or action to defeat and/or interrupt their occupation and use of the said portion of the suit parcel measuring approx. 1.2Ha (3Acres) over the years.
 6. The defendant acting in person, filed a letter dated September 26, 2022 which was deemed to be his response to the plaintiff's claim. It is his claim that according to the sale agreement between him and the late Okwiri Okombo; the portion he agreed to sell to the plaintiff's father was measuring approx. 0.4Ha (1Acre) for a consideration of Kshs. 3,600/= and was therefore not aware of any additional portion or the 1.2Ha (3 Acres) as alleged by the Plaintiff.
 7. He therefore maintained that he is ready and willing to offer the portion he sold measuring 0.4Ha (1 acre) to the plaintiff if they are able to agree and denied the additional claim of about 2 Acres by the plaintiff.

TRIAL

8. On December 6, 2022 the plaintiff's case proceeded for hearing. The plaintiff testified as PW1, he adopted his Supporting Affidavit dated February 17, 2022 together with the annexures thereon as his testimony in chief. It was further his testimony that his late father took possession and occupation of



- a portion of the suit parcel measuring 3Acres in the year 1978 and have continued to occupy and use the said portion to date.
9. He also outlined the various efforts and steps that they have taken to have the said purchased portion transferred and registered in his father's name and for the benefit of his estate to no avail. It was his contention that the Defendant has never asked them to move out of the suit parcel where they have been living for about 44 years and thus urged the court to allow his claim.
 10. He also produced the following documents as exhibits in support of his case as follows;
 - a. Copy of the sale agreement dated June 28, 1978– PExhibit 1
 - b. A copy of the Application for Consent dated April 23, 1980 – PExhibit 2
 - c. Copy of the Report by the Area Chief – PExhibit 3
 - d. Copy of the Report by the D.O – PExhibit 4
 11. On cross-examination, he accused the defendant for the prolonged delay and refusal to have the land transferred to them since the year 1980, despite the several pleas. He further stated that he is not ready to accept the 1 Acre portion as proposed by the defendant and reiterated that the family of the late Okombo Okwiri purchased and have been in occupation and use of a portion measuring 3 Acres. He thereafter closed his case.
 12. The matter thereafter proceeded for Defence Hearing; the Defendant testified as DW1, he adopted his letter dated September 26, 2022 as his testimony and complete evidence in response to the claim against him.
 13. On cross-examination; he maintained that he only sold a portion of the suit parcel measuring approx. 1Acre. He however conceded that he had no document to show that he only sold 1Acre as alleged but stated that the transaction was done orally. He also confirmed that the Plaintiff occupy the suit land. The defendant thereafter closed his case.
 14. Upon close of the defence case, I issued directions on the filing of submissions. The Plaintiff filed his submissions dated December 15, 2022 which I have taken into account while the Defendant relied on his evidence in court as his submissions.

Analysis and determination

15. Having looked at the Originating Summons, the response filed thereto, the respective exhibits and submissions in totality, it is my considered opinion that the issues arising for determination are: -
 - 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.

16. 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](#).



17. The requirements for adverse possession are now well settled. Makhandia, JA in *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor 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. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*, which is in these terms: -

“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.”

18. From the foregoing, it is clear that for a claim of adverse possession to succeed; an applicant must in the first instance acknowledge the right and/or title of the registered owner of the subject land, he must then demonstrate that his possession and occupation of the said land was/is not by force, in secrecy or by the permission of the owner and that the said possession and occupation must be open, in continuity for an uninterrupted period of over 12 years.
19. It is not in dispute that the applicant and their family have been in occupation and use of the suit parcel measuring approx. 3 Acres since 1978; a fact which was further confirmed by the defendant during his testimony in court. The defendant however contends that he is only willing and ready to transfer a portion measuring 1 acre which he agreed to have sold.
20. From the rival claims, it is clear that there was a sale of land transaction between the defendant herein and the late Okombo Okwiri. While the applicant contends that the sale was for a portion measuring approx. 3 acres, the defendant has maintained that the said sale was only for a portion measuring 1 acre. It is therefore my considered opinion that a portion measuring 1 acre is not in dispute and it is common ground that the same rightfully belongs to the Plaintiff.
21. I will now proceed to analyse the remaining 2 acres of the suit parcel. It is important to note that even though the defendant was and is the sole registered owner of the suit parcel, he has not disputed the plaintiff's occupation and use of the entire 3 Acres of the suit land since the year 1978. Further, he has not demonstrated any steps take to either evict or interrupt the plaintiff's use and occupation of the additional 2 acres which he denied as having been sold.
22. Possession and occupation are one of the corner stone in a claim for adverse possession. The plaintiff's possession and use of the suit land commenced in the year 1978, at the time of filing the suit herein the said occupation had been for a period of 44 years which period is more than the statutory 12 years required in a claim of adverse possession. I have also looked at the respective exhibits produced by the plaintiff; he produced bundle of photographs in support of his occupation claims, showing the various houses on the lad and sugarcane plantation. The defendant on the other hand did not produce any exhibit in support of his claims.
23. It is therefore my finding that the applicant has sufficiently demonstrated that he has acquired prescriptive and overriding rights over the portion of the suit parcel measuring 3acres by virtue of his possession and occupation of the suit land from the year 1978. The said rights acquired by the plaintiff



are adverse to the defendant's rights over the same portion of land. consequently, I find and hold that the plaintiff has satisfactorily proved on a balance of probabilities that his occupation and use of a portion of the suit property measuring 3 Acres to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

24. In view of the foregoing, having held that the applicant has proved his claim on adverse possession against the defendant' title to the required standard, I find that he is entitled to the reliefs sought.

CONCLUSION

25. The upshot of the above is that the plaintiff has proved his claim on adverse possession on a balance of probabilities and I accordingly allow the Originating Summons dated February 17, 2022 on the following terms;

- i. A Declaration be and is hereby made that the plaintiff and any other person claiming under him has acquired by way of Adverse Possession a portion measuring approximately 1.2Ha (3 Acres) of L.R. No. North Sakwa/ Kadera Lwala/61.
- ii. It is further declared that the plaintiff is the owner of a portion of L.R. No. North Sakwa/ Kadera Lwala/ 61, measuring approximately 1.2Ha (3 Acres) to the exclusion of the Defendant and any other person claiming under him.
- iii. An Order be and is hereby made the Transfer of a portion measuring approximately 1.2Ha (3 Acres) of L.R. No. North Sakwa/ Kadera Lwala/61 in favor of the plaintiff and that the same be registered into the plaintiff's name within a period of 45 days from the date of this Judgment.
- iv. The defendant be and is hereby directed to execute and/or sign all the necessary transfer instruments/ documents and facilitate the Transfer and registration of the suit property into the names of the plaintiff in within 45 days from the date of this Judgment. In default of which the Deputy Registrar is hereby directed to execute the same in order to facilitate the Transfer.
- v. Costs of the suit to be borne by the defendant.

DATED, SIGNED and DELIVERED Virtually at **MIGORI** on **19th** day of **JANUARY, 2023.**

MOHAMED N. KULLOW

JUDGE

In presence of; -

_____ for the Plaintiff

_____ for the Defendant

Court Assistant - Tom Maurice/Victor

<i>MIGORI ELC CASE NO. 3 OF 2022 (O.S) –JUDGMENT</i>	0
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