



REPUBLIC OF KENYA



KENYA LAW
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**Sule v Otieno & 3 others (Environment & Land Case 38 of 2017)
[2023] KEELC 507 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 38 OF 2017**

E ASATI, J

JANUARY 17, 2023

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

AND

IN TH EMATTER OF ORDER 37 RULE 7(1) CIVIL PROCEDURE RULES

BETWEEN

PEREZ ATIENO SULE PLAINTIFF

AND

SELINA AOKO OTIENO 1ST DEFENDANT

KEVIN KEEGAN OTIENO 2ND DEFENDANT

MARY AKOTH OTIENO 3RD DEFENDANT

RAYMOND ODUOR MUHULA 4TH DEFENDANT

JUDGMENT

Introduction

1. The suit herein was first brought to court on July 21, 2014 vide an Originating summons dated February 26, 2014 and registered as Kisumu HCCC (OS) NO 26 of 2014. It was later transferred to the Environment and Land Court and registered with the current case number. The Originating Summons was later amended and replaced with the amended Originating Summons dated September 2, 2019. The Amended Originating Summons was supported by the averments contained in the Supporting Affidavit sworn by Perez Atieno Sule, the applicant on September 2, 2019.
2. The suit was opposed vide the grounds in the Replying Affidavit sworn by the 1st Defendant Salina Aoko Otieno on December 23, 2019 and the annexures thereto.



3. The matter was canvassed by way of Affidavit evidence and submission pursuant to directions taken by consent of the parties on October 3, 2022.

The Plaintiff's case

4. The Plaintiff's case as contained in the Supporting Affidavit is that she has lived on land parcel known as Kisumu/Wathorego/916 (the suit land) since the year 1982 when she got married to one Bernard Sule and together they established a home on the suit land. That her brothers in law lived on the suit land, died and were buried thereon and their off springs still reside on the land to date. That her mother in law resided on the suit land. That in the year 1994, one Andericus Otieno Adhanja caused the suit land to be registered in his name but nonetheless, did not interfere with the Plaintiff and her family's occupation of the suit land. That her occupation of the suit land has been peaceful and uninterrupted for a period of 19 years since 1994 to the time of filing suit. That she has established her home on the suit land, planted trees and sugar cane and has been cultivating the land over the years. And that because she has had open, overt, clear, noticeable and hostile possession of the suit land, the title of the registered owners have become extinguished.
5. She further contended that as at the time of filing this suit, the suit land was registered in the name of Salina Aoko Otieno, Kevin Keegan Otieno and Mary Akoth Otieno, the 1st 2nd and 3rd Defendants herein who transferred the land from Andericus Otieno Adhanja to themselves. That later, in an attempt to defeat the suit, the Defendants caused the suit land to be subdivided into 3 parcels namely Kisumu/Wathorego/5155, 5156 and 5157. She therefore sought the Court's intervention and grant of orders that:
 - a. That the Plaintiff has met all and singular the requirements for the declaration of extinction of the registered proprietor's rights and or interests in the said parcel of land and for a further declaration the said interests be registered in her name or favour.
 - b. An order cancelling all the sub-divisions which resulted into Kisumu/Wathorego/5155, 5156 and 5157 restoration of the original title Kisumu/Wathorego/916 deletion of the Defendant's names and registration of the Plaintiff Perez Atieno Sule, as the registered owner and proprietor of Kisumu/Wathorego/916.
 - c. The Defendant/Respondent should bear the cost of this suit.

The Defence case

6. The defence case as contained in the Replying Affidavit is that the 1st Defendant is the widow of one Henricus Otieno Adhanja. That Henricus Otieno Adhanja inherited the suit land from his late father. That in the late 1970's he went to work in Uganda and left his uncle in charge of the suit land. That later, Henricus Otieno Adhanja filed a land case at Winam law courts namely case No 11 of 1978 against one Mawanda Okumu who had trespassed onto the suit land. That he won the case and Mawanda Okumu was ordered to vacate. That Henricus Otieno Adhanja consequently obtained demolition orders to demolish the structures erected by Mawanda Okumu on the suit land. That however, the village elders intervened and advised him to give Mawanda Okumu a small portion of land from the suit land since Mawanda Okumu did not have any other land. That Henricus Otieno Adhanja heeded the advice of the elders and gave Mawanda Okumu a small portion of the suit land though actual sub-division was not done.
7. That the Plaintiff herein is the daughter-in-law of Mawanda Okumu because she was married to Bernard Sule a son of Mawanda Okumu. That by the time she was married the agreement between



Mawanda Okumu and Henricus Otieno Adhanja was already in force and hence the two families lived peacefully without any disputes over ownership of the suit land. That when Mawanda Okumu died, he was buried on the small portion of land given to him.

8. It was the Defendants' case that in the years 1998 – 1999 the 1st Defendant's family moved to another land and left a relative known as Achogo to take care and till their portion of the suit land excluding the portion occupied by the family of Mawanda Okumu. That Achogo tilled that portion of the suit land till the year 2005. That in the year 2007, the 1st Defendant's son by the name Paul Odhiambo took possession of the 1st Defendant's portion of the suit land and planted maize, trees and sugar thereon. That from the years 2009 – 2010 or thereabout, the 1st Defendant has been having a problem with the Plaintiff as the Plaintiff kept on trespassing onto the suit land. That whenever the Plaintiff trespassed onto the suit land, the 1st Defendant could remove her. That in the year 2015 the 1st Defendant filed case No Kisumu Civil Case No 389 of 2015 and obtained orders restraining the Plaintiff from burying the remains of her daughter Auma Sule on the suit land.
9. That in the year 2013 the suit land was registered in the name of the Defendants jointly to ensure harmony between all the three houses of the 1st Defendant's husband Andericus Otieno Adhanja who was polygamous. That in the year 2017 the 1st, 2nd and 3rd Defendants sub-divided the suit land to create parcel No.s Kisumu/Wathorego/5155, 5156 and 5157 after following all due process. That the 1st, 2nd and 3rd Defendants thereafter sold and transferred one of the resultant parcels namely, Kisumu/Wathorego/ 5155 to 4th Defendant, Raymond Oduor Muhila. That as at the time of the sub-division and sell of the portion of land to the 4th Defendant there was no injunction restraining the Defendants from so sub-dividing or selling. That the 1st, 2nd and 3rd Defendants only sold their portion to the 4th Defendant and left the portion occupied by the Plaintiff intact. That the sold portion was unoccupied at the time of sale, but the Plaintiff later trespassed and moved into the said parcel.
10. The Defendants contend that they have no intention whatsoever of disposing off the portion occupied by the Plaintiff herein as they intend to abide by the agreement between the 1st Defendant's husband and Mawanda Okumu. That they have no objection if the Plaintiff is given one parcel of the resultant parcels and they retain one. They contended that the Plaintiff has not met the threshold for adverse possession and prayed that the suit be dismissed.

Submissions

11. Written submissions dated October 19, 2022 were filed on behalf of the Plaintiff by MA Ochanji-Opondo & Co Advocates acting for her. Counsel submitted that the issues for determination were the questions raised in the Originating Summons. That the Plaintiff demonstrated that she had been on the suit land since 1982 and that the occupation was peaceful and known to the Defendants.
12. The Defendants filed written submissions dated October 21, 2022 through the firm of Otieno Yogo, Ojuro & Company Advocates acting for them. Counsel submitted inter alia, that the Plaintiff's occupation of the suit land was with the consent and approval of the 1st Defendant's husband hence the same was not adverse. That the occupation was interrupted from time to time.

Issues for determination

13. This court is enjoined by the provisions of Order 21 Rule 4 Civil Procedure Rules, 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. In



this case the questions raised in the amended Originating Summons form the issues for determination herein.

The law

14. Adverse possession is a doctrine of law *vide* which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. Under the provisions of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya, the requisite period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the [Limitation of Actions Act](#). Section 7 prohibits filing of actions for recovery of land after the expiry of 12 years from the date the right of action accrued.

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.

Section 38 (1) and Order 37 [Civil Procedure Rules](#) provide for the procedure of instituting a claim of adverse possession. Under Section 7 of the [Land Act](#) Adverse Possession is recognized as one of the methods of acquiring land in Kenya and under section 28 (h) of the [Land Registration Act](#), Adverse Possession is recognized as an overriding interest to which registered land is subject.

In the case of [Mtana Lewa –vs- Kabindi Ngala Mwangandi \[2015\] e KLR](#) 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.'

The Court further said that limitation of time for land claims as with claims of any other nature exist for three main reasons which are;

- i. A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity indolent).
- ii. A defendant might have lost evidence over time to disprove a state claim.



- iii. Long dormant claims have more cruelty than justice in them (Halsbury's Laws of England, 4th edition.

The Court concluded that the doctrine of adverse possession is neither an arbitrary nor an unconstitutional limitation of the right to property.

Determination

15. The first two questions on the Amended Originating Summons raise the issue of whether land parcel numbers Kisumu/Wathorego/5155, 5156 and 5157 are a result of subdivision of the suit land and whether those resultant parcels are registered in the names of the Defendants. It is abundantly clear from the contents of the Replying Affidavit and the annexures to the Supporting Affidavit that land parcels known as Kisumu/ Wathorego/ 5155, 5156 are a result of subdivision of land parcel no Kisumu/Wathorego/916 and that of the resultant parcels, Numbers 5156 and 5157 are registered in the joint names of the 1st, 2nd and 3rd Defendants while No. 5155 is registered in the name of the 4th Defendant.
16. Questions 3 and 4 on the amended Originating Summons raise the issue of whether or not the Plaintiff has been in actual and active possession and occupation of the suit land and whether the possession has been peaceful, uninterrupted and with the knowledge of the Defendants. There is no dispute that the Plaintiff has been in occupation of the suit land since she entered thereon upon marriage in the year 1982. That she established her home thereon and has been utilizing the land to date. To her Supporting Affidavit, she annexed photographs showing her developments on the land. The Defendants however contend that although the Plaintiff has been on the suit land, she only occupies a small portion thereof that was donated by the 1st Defendant's husband to Plaintiff's father in law in adherence to the advice of elders. That it was only from 2009-2010 that the Plaintiff begun trespassing onto the remainder of the suit land but the Defendants kept on restraining her from such trespass.
17. The court has considered the Defendant's evidence on this issue and noted the following:
 - a. Annexure SAO 1 to the 1st Defendant's Replying Affidavit is indicated to be a copy of proceedings in Winam Court Land Case No 11 of 1978 (herein 'Winam Case') between one Otieno Adhanja and Mawanda Okumu. The proceedings do not disclose the parcel number of the land in dispute. Although PW1, one Otieno Adhanja described the suit land in his testimony as land situated at Kajulu Location, Kamenya sub location measuring 4 acres, there is no further evidence to relate the land described in the Winam Case to the suit land herein. While the suit land described in the Winam case measured 4 acres, the suit land herein as per the copy of register measures 1.0 hectares which is much less than 4 acres.
 - b. The agreement between the Defendant's husband and the Plaintiff's father in law by which the 1st Defendant's husband donated a small portion of the suit land to the Plaintiff's father in law was not produced in evidence.
 - c. The size of the small portion of land donated by the 1st Defendant's husband was not specified even in the pleadings and submissions in this court.
 - d. The Defendants contend that as at the time of the Winam case, adjudication had not taken place hence the suit land did not have a parcel number. There is however no explanation why then 1st Defendant's husband registered the entire land in his name when the adjudication was done later and why he did not cause the donated portion to be registered in the name of the Plaintiff's father in law, husband or the plaintiff.



- e. The Defendants state that they have no intention to take the donated portion from the Plaintiff as they do not wish to go against the agreement between the 1st Defendant's husband and Mawanda Okumu. They offer to surrender one of the resultant parcels to the Plaintiff as they retain one of the portions. There is no evidence that they involved the Plaintiff during the subdivision or surveyed the alleged small portion of land donated to Mawanda Okumu. It is also not clear which of the two remaining resultants portions is in respect of the donated portion.
18. Though the burden to proof of the case rests with the Plaintiff, under section 109 of the Evidence Act Cap 80 Laws of Kenya the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The Defendant have a burden to prove the allegation that the Plaintiff only occupies a portion of the suit land that was donated. The Defendants have not discharged that burden. The existence of the agreement between the 1st Defendant's husband and the plaintiff's father in law has not been proved.
19. I find that the Plaintiff has proved that she has had exclusive open and uninterrupted possession of the whole of the suit land for a period of 32 years that from 1982 to 2014 when the suit was filed. The suit land was registered in the name of the deceased in 1994. He found the Plaintiff in occupation. He ought to have taken steps to remove her. The right of action to remove the Plaintiff accrued to the deceased in 1994. From 1994 to 2014 when the suit was filed a period of about 20 years had elapsed.
20. The next question raises the issue of whether the entry was without the permission of the Defendants. The Plaintiff explains that she entered the suit land upon her marriage to a man resided on the land. This is not disputed. The Defendants response was that as at the time of entry of the Plaintiff onto the suit land, there was already an agreement in place between the Plaintiff's father in law and the 1st Defendant's husband vide which a portion of the suit land was donated and that the Plaintiff's entry onto that portion was therefore with permission of the registered owner. However, this court has already found that the existence of the said agreement between the Defendant's husband and the Plaintiff's father in law has not been proved. Further more though the Defendants allege that the Plaintiff has been trespassing onto the suit land since 2009, there is no evidence that they took any step to assert their rights over the suit land. I find that the Plaintiff's entry and presence on the suit land was inconsistent with the 1st defendant's husband's title and interest in the land, was without the permission of the 1st Defendant's husband or the Defendants and therefore adverse.
21. The next question is whether the Plaintiff has fulfilled all and singular the requirements for declaration for the extinction of the registered owner's interest in the land. The register in respect of the suit land was opened on November 29, 1994. This found the Plaintiff in occupation. Time begun to run in her favour from then. The requisite 12 years expired in the year 2006. The 1st, 2nd and 3rd defendants transmitted the land to themselves in the year 2013. Under Section 28 (h) an overriding interest in favour of the Plaintiff had already been created. Section 28 (h) of the Land Registration Act provides:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a. .
- b. .
- c. .
- d. .



- e. .
- f. .
- g. .
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.

The Registered [Land Act](#) Cap 300 Laws of Kenya (repealed) had similar provisions in Section 30 (f).

22. The rights of the registered owner had become extinguished by operation of the provisions of section 7 of the [Limitation of Actions Act](#). The 1st, 2nd and 3rd Defendants who got the land in their name only did so as successors/administrators of the estate of the deceased. In [Peter Gichuki Wanjohi v Juliah Mumbi Muturi \[2021\] eKLR](#) the Court of Appeal stated that the running of time under the doctrine of adverse possession is cumulative against both the original owner and the successor(s) in title' Similarly in [Titus Kigoro Munyi vs Peter Mburu Kimani \[2015\] eKLR](#), it was held that under Section 7 of the [Limitation of Actions Act](#), the law relating to prescription affects not only present holders of the title but their predecessors. Also see [Douglas Mbugua Mungai v Harrison Munyi \[2019\] eKLR](#). Change of ownership or subdivision of the title does not terminate rights acquired under the doctrine. [Githu vs Ndeete \[1984\] KLR 776](#) where they held that 'Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the [Limitation of Actions Act](#).

' The mere Change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.'

Conclusion

23. This court has found that the plaintiff has been on the suit land for a period in excess of 12 years, that the occupation was over the entire of the suit land, that the occupation was exclusive open continuous with the knowledge but without the permission of the Defendants or the husband of the 1st Defendant and that the title of the said husband of the 1st Defendant had become extinguished by operation of law. On the basis of these determinations this court finds that the Plaintiff has proved her case on a balance of probabilities and enters judgement in her favour for:
- i. A declaration that the title and rights of Andericus Otieno Adhanja, deceased who was the original registered owner of the suit land parcel No Kisumu/Wathorego/916 were extinguished by operation of law.
 - ii. A declaration that the Plaintiff has acquired title to the suit land No Kisumu/Wathorego/916 by the doctrine of adverse possession.
 - iii. An order for nullification of the subdivision of the suit land to produce parcel Nos Kisumu/Wathorego/5155, 5156 and 5157.
 - iv. Cancellation of the resultant parcels namely Kisumu/Wathorego/5155, 5156 and 5157.
 - v. An order for restoration of the suit land parcel number Kisumu/Wathorego/916 in the names of the 1st, 2nd and 3rd Defendants for purposes of transfer of the same to the Plaintiff.



- vi. Transfer of the suit land No Kisumu/Wathorego/916 by the 1st, 2nd and 3rd Defendants to the Plaintiff forthwith failing which the Deputy Registrar of this court to sign all documents necessary so as to effect transfer and registration of the suit land in favour of the Plaintiff.
- vii. Costs of the suit to the Plaintiff.

Orders accordingly.

JUDGEMENT READ AND DATED AT KISUMU, DELIVERED VIRTUALLY THROUGH TEAMS VIDEO CONFERENCING PLATFORM THIS 17TH DAY OF JANUARY 2023.

E. ASATI,

JUDGE

In the presence of

Maureen- Court Assistant

Plaintiff present in person

M/S Anyango Advocate for the Defendant.

E. ASATI,

JUDGE.

