



Otieno (Suing as the personal representative of Johana Kawa Nyagigo & Benjamin Otieno Kawa (Both Deceased) v Odira & 2 others (Environment & Land Case 749 of 2017) [2023] KEELC 15936 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 749 OF 2017
MN KULLOW, J
FEBRUARY 16, 2023
(FORMERLY KISII ELC CASE NO. 446 OF 2013 (O.S))**

BETWEEN

TOM JARED OTIENO (SUING AS THE PERSONAL REPRESENTATIVE OF JOHANA KAWA NYAGIGO & BENJAMIN OTIENO KAWA (BOTH DECEASED) PLAINTIFF

AND

JOASH OUMA ODIRA 1ST DEFENDANT

DORIS OGWENO OSURE (SUED AS THE LEGAL REPRESENTATIVE OF OSURE NYAGIGO (DECEASED) 2ND DEFENDANT

JOASH ODONGO OMWAGA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated November 7, 2013 against the Defendants seeking the following orders: -
 - i. Spent
 - ii. This Honourable Court do issue Interim Preservatory Orders of Injunction restraining the Respondents by themselves, servants, Agents or otherwise howsoever from disposing or interfering with the Applicant’s and the Beneficiaries of the Estate of Johana Kawa Nyagigo And Benjamin Otieno Kawa’s quiet possession of portions of Title Number Kanyamkago/ Kajulu/2063 and 2064 measuring approximately 18 Hectares of the same now registered in the names of the Respondents/ Defendants.



- iii. This Honourable Court be pleased to Declare that the Applicant and the Beneficiaries of the above-named Estate of Johana Kawa Nyagigo and Benjamin Otieno Kawa have jointly and severally acquired Title of Portion of Title Numbers Kanyamkago/ Kajulu/2063 and 2064 measuring 18 hectares in total by way of adverse possession.
 - iv. Costs of the Summons
 - v. Any other order as the Court deems fit and just.
2. The Originating Summons is premised on the 6 grounds thereon and on the Plaintiff's Supporting Affidavit sworn on November 7, 2013. The Plaintiff avers that the original suit land LR No Kanyamkago/ Kajulu/ 128 was jointly registered in the names of Johana Kawa Nyagigo, Benjamin Otieno and Osure Nyagigo. Johana Kawa was entitled/ owned $\frac{1}{2}$ a portion of the original parcel which was equivalent to 26.34Ha while Benjamin Otieno and Osure Nyagigo were both entitled to the remaining $\frac{1}{4}$ portion each measuring 38.30Hectares and 5.26 Hectares respectively.
 3. It was further his contention that even though Osure Nyagigo was entitled to a $\frac{1}{4}$ portion of the original suit land No 128; he surrendered about 18 Hectares of his registered share entitlement to Johana Kawa Nyagigo and Benjamin Otieno Kawa, who have been using the said 18Ha portion openly, without force for uninterrupted period of over 50 years and he annexed photographs in support of the said averments.
 4. He also contends that the families of the deceased registered owners held a meeting where it was resolved that the particulars of registration would be changed to reflect the actual position on the ground. However, the Defendants secretly moved to the lands office and had the suit land subdivided according to the original registration records thus creating Title Numbers Kanyamkago/ Kajulu/ 2062, 2063 and 2064 in respect of the families of Johana Benjamin, Doris Ogweni Osure and Joash Ouma Odira.
 5. He thus claims that the said subdivision, as per the registration records is completely different and clashes with the obtaining situation on the ground which has existed for over 50 years. It is his position that the family of the late Johana Kawa and Benjamin Otieno have settled on the said 18Ha for a period of over 12 years and have therefore acquired title over the same by virtue of adverse possession. He further contends that they stand to suffer irreparable loss and damage if they are evicted and urged the court to grant the orders sought.
 6. The 1st and 2nd Defendants jointly filed a Memorandum of Appearance dated November 15, 2013 and filed a Replying Affidavit sworn on December 2, 2013 by the 2nd Defendant on her own behalf and on behalf of the 1st Defendant. She confirmed the averments by the Plaintiff that the Original suit parcel was jointly registered and owned in common by Johana Kawa, who was entitled to $\frac{1}{2}$ a portion of the entire land, Benjamin Otieno Kawa who was entitled to $\frac{1}{4}$ portion and Osure Nyagigo was entitled to the remaining $\frac{1}{4}$ portion. It is her contention that before subdivision of the original parcel, each of the registered owners and their families were free to occupy and cultivate any portion of the suit land without any obstruction or hindrance. However, each of the three owners had a distinct share, pending subdivision thereof.
 7. She avers that sometimes in May, 2011; she sought and obtained Grant of Letters of Administration in respect of the estate of the late Osure Nyagigo, who was one of the registered owners in common. She followed the due process and had the original land parcel subdivided into 2 portions; LR Nos. Kanyamkago/ Kajulu/2062, which was registered jointly in the names of Johana Kawa Nyagigo and Benjamin Otieno Kawa, which represented $\frac{3}{4}$ portion of the entire parcel and measured 52.35Ha. The



remaining portion LR No Kanyamkago/ Kajulu/ 2063 & 2064 was registered in the names of the 1st & 2nd Defendants measuring approx. 18Ha.

8. She further averred that the said subdivision was carried out in a manner so as not to interfere with the homesteads of the families of the registered owners save for one Elijah Otieno Kawa, who had encroached onto a portion forming part of their rightful share of the parcel. She maintained that the Plaintiff had never been in occupation and possession of any portion of the suit land No 2063 as alleged.
9. It is her claim that the occupation and use of the original land parcel by the Plaintiff and their beneficiaries, prior to the subdivision could not be adverse to the interests of any of the registered owners. She therefore dismissed the claims of adverse possession as being premature, misconceived and legally untenable.
10. She maintained that the Plaintiff had not availed any evidence of his free, continuous and uninterrupted occupation of the suit land and dismissed the photographs produced as being pictures taken from the houses situated on LR No Kanyamkago/Kajulu/2062.
11. With regards to the Agreement/ Resolution referred to by the Plaintiff; it was her contention that no such agreement or resolution could be made over the estate of deceased persons before any succession proceedings had been carried out and Grant of Letters of Administration issued. The 1st Defendant denied the ID number indicated thereon and the signature affixed as a forgery. He therefore urged the court to dismiss the claims by the Plaintiff and to dismiss the Originating Summons with costs.

Trial

12. The matter proceeded for the Plaintiff's case on May 26, 2021; the Plaintiff testified as PW1, he adopted his Supporting Affidavit sworn on 7/11/2013 as his evidence in chief. He further stated that the original suit land was jointly registered in the names of the three owners; Johanna Kawa Nyagigo, Benjamin Otieno Kawa and Osure Nyagigo as tenants in common; with each of the owners having their distinct share entitlement. He added that all the three registered owners, who are since deceased, occupied the land in accordance to the title thereto.
13. It was also his testimony that vide an Agreement dated December 30, 1998 (Pexh 4) between the family members; it was agreed that Osure Nyagigo would only be entitled to 5Ha of the land, which varied from the share revealed in the Title. After the said Agreement they took possession of the remaining share of the 2nd Defendant and have remained in peaceful occupation for over 50 years, that Pexh 4 reflects the actual position on the ground.
14. He produced the following documents as exhibits in support of his case as follows;
 - a. Grant of Representation – PExhibit 1
 - b. Certificate of Official Search dated 11/5/2009 – PExhibit 2
 - c. Bundle of photographs – PExhibit 3(a) to (k)
 - d. Agreement dated 30/12/1998 – PExhibit 4
 - e. Letter dated 4/11/2012 – PExhibit 7
 - f. Extract of the register LR No Kanyamkago/ Kajulu/2062 – PExhibit 8
 - g. Green card in respect of LR No Kanyamkago/ Kajulu/ 2063 – PExhibit 9
 - h. Green card in respect of LR No Kanyamkago/ Kajulu/ 2064 – PExhibit 10



- i. A sketch mutation of the agreed partition of the suit land – PExhibit 11
 - j. Proceedings in Homabay Dist. Magistrate Case No 71 of 1952 – PExhibit 12
15. On cross-examination he conceded that the 3rd deceased Osure Nyagigo was entitled to ¼ share of the original land as evident in Pexh 4,8,9 and 10. He further confirmed that the 2nd Defendant obtained ¼ share of the original land upon subdivision.
16. He however conceded that only deceased 2, Benjamin Otieno Kawa was present when Pexh 4 was being made since the other 2 owners were deceased. Further, that the persons who signed Pexh 4 were not legal administrators of deceased 1 or 3. It was his testimony that neither Pexh 4 nor Pexh 11 were presented for registration at the Lands Registry.
17. John Odero Ogutu testified as PW2, he adopted his witness statement dated November 20, 2019 and filed on 6/12/2019 as his testimony and evidence. He further stated that the original suit land belonged and was registered in the name of his uncle Johanna Kawa. He maintained that Deceased 1 (Johana Kawa) gave a portion measuring 5 Acres to Deceased 3 (Osure Nyagigo) and that the rest of the portion was occupied and used by Johanna Kawa and Benjamin Otieno Kawa and their beneficiaries; who have remained in peaceful occupation and use for a period of over 50 years.
18. On cross-examination, he conceded that the original land parcel LR No Kanyamkago/Kajulu/ 128 was registered in the names of the 3 deceased; Johanna Kawa, Benjamin Otieno and Osure Nyagigo but denied the share entitlement of the three as per the registration. He further testified that he had no proof to show that deceased 3, Osure Nyagigo was given 5 Acres only.
19. Angelina Akinyi Odero testified as PW3; she adopted her witness statement as her evidence and testimony. She further stated that she has peacefully used and lived on the suit land for a period of over 50 years. It was also her testimony that Osure Nyagigo was only entitled to 5 Acres of the original suit land.
20. On cross-examination, she maintained that even though the original land was registered in the names of the three deceased owner, the 2nd Defendant was only entitled to 5 Acres and not 17.45Ha.
21. Dorka Amolo Otieno testified as PW4; it was her testimony that she is the wife of Benjamin Otieno Kawa and has lived on the suit land for a period of over 50 years. She further stated that the Osure family are only entitled to 5 Acres.
22. Askar Ayiera Otieno testified as PW5, she adopted her witness statement dated November 20, 2019 as her testimony and evidence in chief. The Plaintiff thereafter closed his case.
23. The Defence Case proceeded for hearing on October 19, 2022; Leah Auma Orago testified as DW1, she adopted her witness statement dated 9/3/2019 and filed in court on 6/7/2020 as her evidence in chief. She further stated that the original suit parcel LR No Kanyamkago/ Kajulu/ 128 was jointly registered in the names of Johana Kawa Nyagigo, Benjamin Otieno Kawa and Osure Nyagigo with a share entitlement of ½, ¼ and ¼ of the original parcel respectively.
24. It was her testimony that the original land parcel was subdivided into 2 portions; No 2062 and 2063 which was registered in their favor and is equivalent to 17.45Ha, as per the original share entitlement of her late father from the original registration. The remaining portion No 2062 was registered in favor of the beneficiaries of both Johana Kawa and Benjamin Otieno and which is equivalent to ¾ share of the original land.



25. She produced the documents in her List of Documents as Defence Exhibits Dexh 1 – 16 in further support of their case.
26. On cross-examination, she reiterated that they all occupied the original parcel No 128 as tenants in common while awaiting subdivision. She further stated that even though each of the original owners lived on their distinct portions, one Elijah had encroached into their share and was required to relocate upon subdivision. The Defence thereafter closed their case.
27. Upon close of the defence case, I issued directions on the filing of submissions. Both the Plaintiff and the 1st and 2nd Defendant filed their rival submissions and authorities which I have read and taken into account in arriving at my decision as hereunder;

Analysis And Determination

28. I have considered the pleadings, the evidence and the submissions filed herein and I find the issues arising for determination are as follows: -
 - a. Whether the Plaintiff has proved his claim of Adverse Possession.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
 - c. Who should bear the costs of the suit

A. Whether the Plaintiff has proved his claim of Adverse Possession.

29. 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](#).
30. The court in [Samuel Kihamba v Mary Mbaisi](#) [2015] eKLR on the issue of adverse possession held as follows: -

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of animus possidendi, or intention to have the land” (emphasis mine)
31. It is the Plaintiff’s contention that the families of the late Johana Kawa and Benjamin Otieno have been in possession and occupation of a portion of the suit property for over 50 years. It was further his testimony that the original parcel No 128 belonged to the patriarch Johana Kawa, who then invited his brother and gave him 5.12Ha and which is the 2nd Defendant’s only entitlement. This position was reiterated by the PW2, PW3, PW4 and PW5 who testified on his behalf.
32. It is also his claim that the subdivision of the original parcel though a reflection of the original registration of the 3 parties as Tenants in Common; the same did not reflect the actual position on the ground as per Pexh 4. He averred that the 2nd Defendant has only been in possession and use of a portion measuring 5.12Ha of the entire parcel and not the ¼ share that he was originally entitled to.
33. The 2nd Defendant on the other hand maintained that the family of the late Osure Nyagigo has always been in use of their ¼ portion and denied any claims by the Plaintiff that he has been in occupation of the same portion. It was her contention that the subsequent subdivision was legally done and the



same was in accordance to the entitlement of his late father from the first registration of the 3 original owners as Tenants in common, to wit, $\frac{1}{4}$ share of 69.93Ha which is approx. 17.45Ha. This was further confirmed by Dexh 12 and 13 which is a copy of the Green Card and Title Deed in respect to parcel LR No Kanyamkago/ Kajulu/ 2063 which was duly registered in their name. She therefore dismissed the claims of adverse possession as raised by the Plaintiff.

34. It is clear that the original parcel of land No 716 was jointly registered in the names of Johana Kawa, Benjamin Otieno and Osure Nyagigo; the same was confirmed by both the Plaintiff and the Defendant in their pleadings. The 3 registered owners held the land as tenants in common with each of them having their distinct share as follows; Johana Kawa $\frac{1}{2}$ a portion, Benjamin Otieno and Osure Nyagigo each held $\frac{1}{4}$ portion of the said parcel which measure 69.93Ha in total; this was further confirmed by Dexh 3 which is a copy of the Green Card. The assertion by the Plaintiff and his witnesses that the entire land belonged to the late Johana Kawa is therefore not true and further, no evidence was adduced to confirm the said averments.
35. Having determined that the original suit land was held in common by the 3 registered owners and ascertained that each of them would have been entitled 34.9Ha, 17.45Ha and 17.45 respectively. The next issue is whether the occupation and use by the Plaintiff – families of the late Johana Kawa and Benjamin Otieno; of the suit parcel over the years became adverse to the rights of the 2nd Defendant over his rightful share of the land.
36. Adverse possession must start with a wrongful dispossession of the rightful owner and same must be actual, visible, exclusive and continued over the statutory period of 12 years. In the instant case; the original suit land was owned by the families of the registered owners as tenant in common. All the families freely occupied and used the same but their share entitlement was clear and distinct, the land therefore belonged to both the plaintiff and the Defendants in their respective shares.
37. Further, the Plaintiff claims that the suit land originally belonged to Johana Kawa and he only gave the 2nd Defendant a portion measuring 5.26Ha. I wish to restate that the Plaintiff cannot on the one hand claim adverse possession and on the other hand challenge the ownership/title of the 2nd Defendant over the suit parcel portion. One cannot adversely acquire that which belongs to him.
38. The question that follows is whether adverse possession can accrue in respect of land held in common (tenancy in common) and at what point does time for adverse possession starts to run. It is my considered view that time for adverse possession will only start to run upon the subdivision of the title held in common and the issuance of the respective individual titles. It is only then that time will run against the title of the registered owner and in favor of the adverse possessor, who seeks to dispossess the registered owner of his title. In this case, the original land was subdivided in the year 2012 and the suit herein was lodged in 2013. Thus, the statutory 12 years' period required in an adverse possession claims had not materialized or crystallized at the time and the claim is therefore premature.
39. Further, the Plaintiff herein has neither demonstrated when their possession and occupation of the suit land became adverse nor when they dispossessed the 2nd Defendant of his rightful share/ title of the original suit land. As stated above; it is the Plaintiff's contention that the suit belonged to his grandfather on the one hand, he also claims that the late Johana Kawa only gave the 2nd Defendant a portion measuring 5.26Ha and which they are entitled to, he further contends that even though the 2nd Defendant was entitled to $\frac{1}{4}$ portion of the original land, vide Pexh 4, it was agreed that the Osure Family would only retain a portion measuring 5Ha and they have subsequently acquired adverse possession over the 2nd Defendant's $\frac{1}{4}$ portion save for the 5.26Ha. From the 3 different accounts by the Plaintiff; it is unclear when time for adverse possession started running and whether the Plaintiffs



indeed dispossessed the 2nd Defendant of his rightful title of the original land to give rise to adverse possession.

40. It is trite law that long possession is not necessarily adverse possession, the onus is on the Plaintiff seeking adverse possession to demonstrate that the said possession had the effect of dispossessing the title holder. The Court of Appeal in *Wambugu —v- Njuguna* (1983) KLR 173, held as follows: -

“Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his Possession for the statutory period, and not whether or not the claimant has proved that he or she has been in Possession for the requisite number of years.”

41. Consequently, I find and hold that the Plaintiff has not satisfactorily proved his claim on Adverse Possession to the required standard to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

42. In view of the foregoing, having held that the Plaintiff has not proved his claim on adverse possession, it follows therefore that he is not entitled to the reliefs sought.

Costs of the Suit

43. Costs generally follow the event and in this case, having held that the Plaintiff is not entitled to the reliefs sought, I find that the 1st and 2nd Defendants are entitled to costs of the suit.

Conclusion

44. In the upshot I find that the Plaintiff has failed to prove his claim on adverse possession to the required threshold and I accordingly dismiss the Originating Summons dated November 7, 2013 with costs to the 1st and 2nd Defendants.
45. Further, the Plaintiff and beneficiaries/dependants of the estate of the late Johana Kawa Nyagigo and Benjamin Otieno Kawa are hereby ordered to vacate a portion of the suit parcel LR No Kanyamkago/ Kajulu/ 2063 which they occupy within 90 days from the date of this Judgment. However, any eviction should strictly comply with the statutory provisions of section 152E of the *Land Act*. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 16TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Plaintiff present in person

2nd Defendant present in person

Court Assistant - Tom Maurice/ Victor

