



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 48 OF 2018

PETER OKOTHPLAINTIFF

VERSUS

AMBROSE OCHIDO ANDAJO.....1ST DEFENDANT

BENEDICT ODHIAMBO OKETCH2ND DEFENDANT

JUDGMENT

By an Originating Summons dated 28th May 2004, the Plaintiff sued the Defendant seeking for the following orders:

- a. That the applicant is entitled to the whole parcels in plot 3 Bondo Township as a purchaser for value from predecessor of the respondent.
- b. That the applicant be declared to be entitled to a portion of the plot formerly referred to as side A and Side B.
- c. That the Honorable court be pleased to declare that the 1st and 2nd respondent are holding the land in trust for the applicant.
- d. That the Honorable court be pleased to declare that the applicant is entitled to the whole parcel land by virtue of adverse possession.
- e. That the Honorable, court be pleased to compel the 1st and 2nd respondent to transfer land parcel Bondo/Market/3 to the applicant.
- f. THAT in the alternative and if he 1st and 2nd respondent refuse to sign transfer documents, the court be pleased to allow the deputy registrar to sign the same

PLAINTIFF'S CASE

PW1 adopted his witness statement and testified that the suit property Bondo Market Plot No 3 belonged to his uncle one Clement Andajo Ochido son of the late Ambrose Ochido who died in 1956. It was his evidence that Plot NO 3 remained vacant/underdeveloped until 1971 but PW1 paid all the rates arrears when Bondo County Council wanted to repossess it.

PW1 also testified that Clement Andajo and his brothers promised to give him a portion of the plot therefore he started construction in 1972. PW1 further stated that in order to register his interest on the portion that he had built, he went to the Siaya County Council whereby it asked the parties to agree on the registration of the plot and produced minutes dated 23rd March 1973 as an exhibit

It was PW1's testimony that the Council subsequently registered him and other co-owners of plot No. 3 Bondo Market as per Pex 2 dated 12th June 1973 whereby the Siaya County Council met and sanctioned that PW1's name to appear on the register of PLOT 3 as joint owners namely, PAUL AJULU, JAKOB JARUNGU AND PETER OKOTH OMENO.

PW1 finally stated that he has been paying rates for the suit plot and that despite his proprietary rights over plot No. 3 Bondo Market, the 1st defendant has been threatening to evict him from the said parcel in total disregard of his uninterrupted occupation since 1972.

Further that PW1 was shocked to find that the 1st defendant registered the whole of plot No 3 Bondo in his own name without involving

PW1 as one of the co-owners. PW1 urged the court to grant the orders as prayed in the originating summons

DEFENDANTS' CASE.

DW1 adopted his witness statement and stated that it is not in dispute that the original owners of the suit land in question were, Ambrose Ochido (1st respondent's grandfather), Clement Ochido (1st respondent's father), Jacob Jarungu Ochido (1st respondent's uncle) and Paul Ajulu (1st respondent's uncle). That the suit plot was a leasehold and not freehold.

DW1 further testified that these original lessors owned the suit property for a period of 33 years from 1st April 1965 whereby the said lease expired on or about 1st April 1998 and subsequently the property reverted back to the County Council and was up for grabs by whoever would have applied to the County Council to be issued with a fresh lease.

DW1 stated that the applicant's assertion that he bought the suit property from the original owners cannot stand as the original owners lease expired after 33 years therefore they could not pass a good title. DW1 urged the court to dismiss the plaintiff's suit as he has not proved adverse possession.

PLAINTIFF'S SUBMISSIONS

Counsel submitted on the issues for determination by the court as per the prayers in the originating summons.

On the first issue as to whether the applicant is entitled to the suit plot No. 3 Bondo Township as a purchaser for value from predecessor of the respondent, counsel submitted that it is not in doubt that the suit property was initially registered in the names of both the Plaintiff and the PAUL AJULU, JAKOB JARUNGU AND PETER OKOTH OMENO as per Pex 4 which was sanctioned on 12th June 1973 by the Siaya County Council

Counsel also submitted that the plaintiff paid rates for the whole as per the receipts from the Siaya County Council. That the defendant's adduced no evidence to challenge the plaintiff's evidence and that it is presumed that if a property is owned jointly, then the parties made equal contributions. Counsel cited the case of **K N Vs...M P N [2017.1 eKLR]**, where the Court held that;

"Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu -v- Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal. In determining the beneficial interest of cohabitants who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union"

Counsel further relied on the case of **Moses Bii ...Vs... Kericho District Land Registrar & another [2015] eKLR** where the Court held that:

"My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the dearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. for myself cannot think of such a state of affairs other than where the proprietors are spouses, though / cannot rule out other situations, but they real//y must be so dear as to obviate debate on it."

It was counsel's submission that whether the land is held in common or is jointly owned, the only difference between the two would be the issue of survivorship and that it is not in doubt that both parties held interests and rights over the suit property and therefore, they both have rights and interests over the suit property. Further, unless the same is severed, the parties are to consult each other before any dealings with the suit property.

Section 91 of the Land Registration Act provides;

(1) In this Act, Co-tenancy means the ownership of/and by two or more persons in undivided shares and includes joint tenancy or tenancy in common,

If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

dispositions may be made only by al/ the joint tenants;

on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

If any land, lease or charge is owned in common; each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

(6) No tenant in common shall deal with their undivided share in favour of any person other than tenant in common, except with the

consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

Counsel submitted that if land is co-owned, one co-owner cannot deal with the suit property without the consent of the other as no one co-owner has a better right than the other and urged the court to find that the Defendants have no right to deal with the suit property without the plaintiff's consent,

DEFENDANTS' SUBMISSIONS

Counsel submitted that the lease expired on 1st April 1998 after 33 years as the plaintiff did not renew the same hence the rights were extinguished.

Secondly counsel submitted that the plaintiff has not met the threshold for adverse possession and cited the case of **Wambugu —v- Njuguna (1983) KLR 173**, where the Court of Appeal held that

“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.”

Counsel further submitted that the requirements for adverse possession in Kenya was also discussed in the case of **Mbira -vGachuhi (2002) IEALR 137** in which the court held that:

“...a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption

Counsel also relied on the case of **Jandu -v- Kirplal & Another (1975)EA 225**, where the court held that: to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and noto Counsel therefore urged the court to find that the plaintiff has not been in open, exclusive and uninterrupted occupation for a minimum period of 12 years. That under Section 7 as read together with Section 13 of the Limitation of Actions Act, the owner of a property loses the right to claim his property after it is occupied continuously without interruption by an adverse possessor

It was counsel's further submission that the respondent herein had admitted in paragraph six of his replying affidavit that he had inherited the suit property upon doing succession on the estate of the original owners and further confirmed during evidence in chief that by the time he was doing the said succession proceedings the lease was almost expiring and had to apply for the renewal, hence it cannot be said that he was holding the suit property in trust for the plaintiff.

Counsel therefore urged the court to dismiss the suit with costs to the defendants.

ANALYSIS AND DETERMINATION

I have considered the pleadings, the evidence and the submissions by counsel and the issues that arise for determination are as follows:

- a. Whether the applicant is entitled to the whole plot 3 Bondo Township as a purchaser for value from predecessor of the respondent.
- b. Whether the respondents are holding the land in trust for the applicant and whether the applicant has acquired the suit the land by virtue of adverse possession hence entitled to be registered as owner.

The applicant gave evidence and produced documents to buttress his claim for adverse possession. It was his evidence that he was a co-owner of the suit land having been allowed to construct in 1972 and paid rates to the Siaya County Council whereby he produced payments receipts.

It is further on record that the Siaya County Council met and vide minutes dated 23rd March 1973 asked the parties to agree on the registration of the plot and subsequently sanctioned the registration of the applicant, PAUL AJULU, JAKOB JARUNGU AND PETER OKOTH OMENO as co- owners of the suit plot. It is further not disputed that the applicant has been paying land rates and that he has constructed shops of the suit plot.

Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law which is 12 years as per the Limitation of Actions Act, Cap 22 of the Laws of Kenya According to Halbury's Laws of England, 4th Edition Volume 28, paragraph 768.

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v saikwa (2) (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another’s persons land with that person’s consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

In India Supreme Court decision in the case of **Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

It should be noted that the respondent claimed that he filed a succession cause and later renewed the lease which was about to expire. The law on prescription affects not only the present title holders but also their predecessors as was held in the case of **Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR** where it was observed that:

“It must be noted 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.

In the case of **Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111**) the Court of Appeal held that a claim for adverse possession subsists not only against the present holders but also their predecessors in title. It is on record that the applicant occupied the suit plot in 1972 when he did the construction and remained in exclusive possession, openly and without any interruption until 2018 when he filed this suit.

Similarly in the case of **Karuntimi Raiji v. M’Makinya M’itunga (2013)eKLR** the Court of Appeal observed:-

“...Another issue raised by the appellant is that a claim for Adverse Possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the Law Reform Act provide an answer to the issue. Section 30 provides that:

“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 them being noted on the registers:

a.;

b.;

c.;

d.;

e.;

f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

Under the doctrine of adverse possession, a claimant's claim to the land runs against the title and not necessarily against the current holder of the title. The respondents' submission that he renewed the lease when he filed a succession cause and therefore the applicant's rights had expired does not hold any water.

In the case of **James Mwangi & Others – v- Mukinye Enterprises Ltd. Nairobi Civil Case no. 3912 of 1986**, a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and an uninterrupted occupation for more than 12 years. It is on record that the applicant has been in continuous uninterrupted occupation for a period of over 12 years which the respondents wanted to dislodge but it was too late as the doctrine of adverse possession had already set in.

On the issue as to whether the respondent is holding the suit land in trust for the applicant, in the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** Kuloba J held that:

“The cases lay down that where a plea of adverse possession of land registered under any of the land registration statutes is upheld, the registered proprietor holds the land in trust for the person who had acquired title against the owner, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by the Limitation of Actions Act. So, at the expiration of the statutory period, the registered owner holds the land in trust for the person who has adverse possession (Simpson, J (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 531). And according to one judicial view, the creation of a trust, like a mortgage or charge, amounts to a disposal or dealing in land requiring the consent thereto of the relevant Land Control Board under the Land Control Act (Harris, J, in *Githuci Farmers Co Ltd v Gichamba* [1973] E A L 8 at 10, 11; but Madan J (as he then was), disagreed with Harris, J, on this point, in *Kinguru v Gathangi* [1976] Kenya L R 253 at 264).

As to the date from which the period of limitation or prescription begins to run against the owner of land, the Courts have held that it runs from the date when the owner was entitled to immediate possession and the squatter occupied the land under some colour of right. In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land (Sir Joseph Sheridan, CJ, in *Alibhai v Alibhai* [1938] 5 E A C A 1 at 3, 4; Miles, J, in *Gathure v Beverly* [1965] E A 514; and Hancox, J (as he then was) in *Wandera and another v Attorney – General* [1976] Kenya L R 275, at 276). Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya L R 236 at 239; also see among others, Simpson J (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 529, 530). As a general rule, time does not run against a person who is under some legal disability. Where, however, the right of action first accrued to a person who was not under a disability and through whom a person under a disability claims, time will run against the latter during the period the guardian should have sued (Simpson, J in *Hosea v Njiru and others* [1974] E A 526 at 530). But any act of acknowledgement by the intruder, of the title of the proprietor during the period of possession, before the twelve years run, interrupts the running of time, and destroys adverse possession (ibid, at 530; and *Wainaina v Murai and others* [1976] Kenya L R 227 at 231).

It follows that the respondents hold the land in trust for the applicant having been registered as owners of the suit plot. The respondents' rights were extinguished upon the attainment of 12 years of uninterrupted occupation.

The court further held that the land in question must be identifiable by clear boundaries and demarcation and stated as follows:

“The land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain. The absence of a plot or title number need not present any difficulty; nor should it be a bar to establishing a claim of adverse possession (Madan, J (as he then was) in *Kinguru v Gathangi* op cit, at p 260). On the other hand, however, the adverse occupation of a disputed portion of a large piece of land under one title, for twelve years does not, in law, constitute adverse occupation of the rest of the land to which adverse acts do not extend during the statutorily prescribed time (Harris, J, in *Matheri v Kanji* [1976] Kenya L R 140 at 141).

In the instant case the suit plot is identifiable as Plot No 3 Market plot of which a title has been issued and the applicant has been paying rates thereto. Having considered the pleadings, the evidence, submissions and the relevant authorities, I come to the conclusion that the applicant has proved that he has acquired the suit plot by way of adverse possessions and is therefore entitled to the orders sought in the originating summons together with costs.

DATED AND DELIVERED AT ELDORET THIS 13TH OF MAY, 2021

M. A. ODENY

JUDGE