



**Ogoya (Suing as the Legal Representative of the Estate of Ezekiel Ogoya Nyoloo-Deceased) v Ogeka (Environment & Land Case 10 of 2021) [2023] KEELC 16667 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 10 OF 2021  
GMA ONGONDO, J  
MARCH 27, 2023**

**BETWEEN**

**CALEB OGWEDHI OGOYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EZEKIEL OGOYA NYOLOO-DECEASED) ..... PLAINTIFF**

**AND**

**DALMAS OOKO OGEKA ..... DEFENDANT**

***(IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE LAWS OF KENYA (ADVERSE POSSESSION))***

**JUDGMENT**

**A. Introduction**

1. At the outset, it is noteworthy that Caleb Ogwedhi Ogoya (PW1 herein) substituted the original plaintiff, Ezekiel Ogoya Nyoloo (Deceased-1) as noted in the court proceedings of June 14, 2022 and as discerned in Letters of Administration Ad Litem of June 10, 2022 issued in Oyugis Principal Magistrate's court Miscellaneous Succession Cause number 52 of 2022 and filed herein
2. The central property in the instant dispute is all that piece of land reference number East Kasipul/Kojwach Kamioro/2461 measuring approximately zero decimal one eight hectares (0.18 Ha) in area (The suit land herein). The same is located within Homa Bay County. It is a sub division of land reference number Kasipul/Kojwach Kamioro/978 (The parent land herein).
3. The plaintiff in this suit is represented by the firm of Achillah and Company Advocates.
4. The defendant appears in person herein.
5. On November 16, 2022, the court exercised its powers under Order 37 Rule 19 of the [Civil Procedure Rules, 2010](#). The suit was heard by way of viva voce evidence.



6. Initially, the suit was lodged at Migori Environment and Land Court. On September 27, 2021, it was transferred to this court for hearing and determination in light of Articles 6 (3) and 48 of the Constitution of Kenya, 2010.

### **B. The Plaintiff's Case**

7. By an originating summons dated January 29, 2019 and lodged in court on February 8, 2019 under Order 37 of the Civil Procedure Rules, 2010, the plaintiff is seeking the orders infra;
  - a. THAT the plaintiff be declared to have become entitled by adverse possession to the suit land.
  - b. THAT the Land Registrar Rachuonyo be ordered to register the plaintiff herein as the sole proprietor of the suit land in the place of Dalmas Ooko Ogeka, the defendant.
  - c. The defendant by himself, his servants, his employees, his agents or otherwise whomsoever acting pursuant to his instructions individually or collectively or otherwise be permanently restrained from trespassing, alienating, entering, occupying, dealing and/or interfering in any way with plaintiff's quiet possession, use, occupation, development and proprietorship of the suit land or any part thereof.
  - d. The cost of this Application be provided for.
8. The originating summons is supported by the plaintiff's affidavit of fourteen paragraphs sworn on even date and the annexed documents, inter alia, a certificate of official search dated May 7, 2018 alongside photographs of a homestead on the suit land as well as grounds 1 to 4 set out on it's face. In summary, the plaintiff's complaint in part, is that he purchased the suit land from the defendant's father Pitalis Ogeka Onganga (Deceased-2) as revealed in a sale agreement dated January 6, 1972. That the suit land is registered in the name of the defendant with effect from November 6, 2017. That the defendant has threatened to evict him from the suit yet he has openly, continuously and peacefully been in possession of the same since 1972 hence precipitating this suit.
9. The original plaintiff's son (PW1) testified, inter alia, that he is the legal representative of the estate of Deceased-1. He relied on the supporting affidavit in support of the originating summons sworn by deceased-1 together with the annexed documents marked as E0N 1 to E0N 4 (PExhibits 1 to 4). He stated in part, that he cultivates the suit land, lives thereon and that the defendant has not taken any step to evict him from the same.
10. In his submissions dated February 10, 2023 and filed in court on February 15, 2023, learned counsel for the plaintiff made reference to the originating summons, the response thereto and the evidence of PW1. Counsel urged the court to strike out the response which is not signed as required under Order 2 Rule 16 of the Civil Procedure Rules, 2010. That res judicata principle is not applicable to this suit and that the claim is sustainable. Counsel relied on section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya and this court's decision in the case of Tobias Odhiambo Abach-vs-Elijah O Opar (2018) eKLR, among other authorities, to reinforce the submissions.

### **C. The Defendant's Case**

11. The defendant opposed the originating summons by his response dated February 28, 2019 where he stated that;
  - a. The court has no territorial jurisdiction. The suit land is in Homabay County and not Migori County. The matter therefore should have been filed either in Oyugis court of Homabay High Court. It will be expensive for me and my witnesses to be travelling to Migori.



- b. There was a related case of Oyugis Principal Magistrate's Court that is ELC No 34 of 2018 involving the same parties, the same subject matter and which case was dismissed on October 3, 2018 a copy of which is annexed herewith.
  - c. The plaintiff has not lived on the suit land peacefully and uninterruptedly for a period of 12 years as alleged. This is because we have had disputes over boundary, meetings at the commissioner's offices and chief's offices, court etc. copies of such are hereby annexed.
  - d. No consent of Land Control Board was acquired within six months from the dated of alleged agreement as required by the law.
12. In support of the response, the defendant annexed a copy of judgment in Oyugis Principal Magistrate's court Environment and Land case number 34 of 2018 delivered on October 3, 2018 involving the same suit land (DExhibit 1) as well as Deputy County Commissioner's letter dated March 4, 2018 (DExhibit 2) and chief's letter (DExhibit 3).
  13. In his evidence, the defendant (DW1) termed the plaintiff's claim false. That the suit land is registered in his name. He relied on DExhibits 1 to 3 herein.
  14. By his submissions dated February 28, 2023, the defendant relied on his response to the originating summons and the documents annexed thereto. He submitted in part that DW1 forcefully moved into the suit land in the year 2011 after the death of Deceased-1. That he has had dispute with the plaintiff over the suit land thus, adverse possession claim cannot hold.

#### **D. Issues For Discussion**

15. Order 15 of the Civil Procedure Rules, 2010 provides for issues and materials from which issues may be framed in a suit.
16. It is trite that issues for determination in a suit arise out of pleadings generally or as framed by parties for the court's determination; see *Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720*.
17. In that regard, the issues that arise in this suit for discussion are condensed as follows;
  - a. The court's jurisdiction over the suit
  - b. Is Res judicata principle applicable herein?
  - c. Competency of the defendant's response to the originating summons.
  - d. Subject to issues (a) (b) and (c) supra, has the matter met the ingredients of adverse possession?

#### **E. Discussion And Determination**

18. As pertains to the first issue, *Halsbury's Laws of England (4th Edition) Volume 9* at page 350 defines the term 'Jurisdiction' as;
  - ' The authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision.'



19. In *Samwel Kamau Macharia and another-vs-Kenya Commercial Bank and others (2012) eKLR*, the Supreme Court of the Republic of Kenya held that-
- ' A court's jurisdiction flows from either Constitution or legislation or both. It can not arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'
20. It is well settled that a party may raise a preliminary objection on a point of law including an objection to jurisdiction of court; see *Mukisa Biscuits Manufacturing Company Ltd-vs-West End Distributors Company Ltd (1969) EA 696*.
21. Further, I am guided by the decision in the case of *Owners of Motor Vessel 'Lillian S'-vs-Caltex oil (Kenya) Ltd (1989) KLR 1* that jurisdiction is everything. That without it, a court has no power to take one more step.
22. The jurisdiction of this court is anchored in Article 162 (2) (b) of the *Constitution* of Kenya, 2010. This is fortified by the case of *Republic-vs-Karisa Chengo and others (2017) eKLR* and section 13 (1) of the *Environment and Land Court Act*, 2015 (2011). The present dispute falls within the jurisdiction of this court owing to its nature, in particular, title to the suit land and as noted in paragraph 6 hereinabove, this court has the jurisdiction over the matter.
23. The second issue relates to Res Judicata principle. Indeed, judgment was rendered on October 3, 2018 in Oyugis PMCC No 34 of 2018 involving the same parties and same suit land.
24. Section 7 of *Civil Procedure Act* (Cap 21) anchors the principle of Res Judicata. I take into account all the elements of the principle.
25. In *Black's Law Dictionary 10<sup>th</sup> Edition* at page 1504, the term 'Res Judicata' means an issue that has been definitively settled by judicial decision. Moreover, it sets out the three essential elements as;
- a. An earlier decision on the issue,
  - b. A final judgment on the merits, and
  - c. An involvement of the same parties, or parties in privy with the original parties.
26. In the judgment in Oyugis PMC case No 34 of 2018, the court noted that the defendant therein was duly served and only entered appearance. That he did not file any defence in the suit.
27. It is established law that a party should not suffer the penalty of not having his case determined on its merits; see *Philip Chemwolo and another-vs-Augustine Kubende (1986) eKLR*.
28. In *Kanwal Sarjit Singh Dhiman-vs-Kashavji Jivraj Shah (2015) eKLR*, the Court observed that;
- ' The courts exist for purposes of dispensing justice and that the sword of justice cuts both ways. Further, it has been said time and again that a technical judgment is not the best judgment.'
29. Plainly, Oyugis PMC case No 34 of 2018 was determined on a technicality and not on its merits as defence was not filed therein. Therefore, the elements of res judicata are not satisfied herein as noted in paragraphs 25, 26, 27 and 28 hereinabove.
30. As regards the third issue, this court is conscious of Order 2 Rule 16 of the Civil Procedure Rules, 2010. The plaintiff contended that the defendant did not sign the response duly filed herein hence no response to the originating summons which out to be strike out.



31. Clearly, the response to the originating summons has a mark or sign immediately above the respondent's name, an indication that he signed the same. Furthermore, under Order 19 Rule 7 of the Civil Procedure Rules, 2010, a court may receive an affidavit notwithstanding any defect or irregularity thereof. Also, any procedural defect thereof is cured under section 19 of the *Environment and Land Court Act*, 2015 (2011) and Article 159 (2) (d) of the *Constitution* of Kenya, 2010.
32. On the fourth issue, there is no dispute that the suit land is registered in the name of the defendant. Further, the PW1 stated that there has been no dispute between the parties herein over the suit land and the same was affirmed by DW1 who during cross examination, stated that PW1 lives thereon and there had been no documented complaint over the same.
33. Evidently, the plaintiff has been in continuous possession of the suit land in excess of twelve years. The defendant has been dispossessed of the suit land which is registered in the name of DW1 by the plaintiff; see generally Halsbury's Laws of England 3<sup>rd</sup> Edition paragraphs 481 and 482 at pages 251 and 252.
34. In the foregone, this court is guided by section 7 of the *Limitation of Actions Act* (Cap 22) alongside *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Baksbwein and another (2015) eKLR*, *Elijah OL Opar-vs-Tobias Odhiambo Abach (2019) eKLR* and *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others (2017 KLR)*, among other authoritative pronouncements. I am satisfied that the plaintiff has established the elements of adverse possession against the defendant on a balance of probabilities and he is entitled to the orders sought herein.
35. Wherefore, judgment is hereby entered for the plaintiff against the defendant in terms of all the orders sought in the originating summons and as stated in paragraph 7 (a) (b) (c) and (d) hereinabove.
36. It so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF MARCH 2023**

**GEORGE M.A ONG'ONDO**

**JUDGE**

**PRESENT**

- a. Ms. Kisaka, holding brief for Achillah learned counsel for the plaintiff.
- b. Defendant, present in person.
- c. Court Assistants, Mutiva and Ochumba.

