



REPUBLIC OF KENYA



KENYA LAW
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**Ong'ondo v Ongus (Environment and Land Appeal E007 of 2022)
[2023] KEELC 16461 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E007 OF 2022
GMA ONGONDO, J
MARCH 22, 2023**

BETWEEN

ERIC ODHIAMBO ONG'ONDO APPELLANT

AND

ALOICE OBONGO ONGUS RESPONDENT

*(Being an appeal from the entire Ruling of Hon. J.S Wesonga (SRM,
now PM) delivered on the 17th September, 2021 in Homa-Bay Principal
Magistrate's court Originating Summons number 44 of 2020)*

JUDGMENT

1. The central property in the present appeal is land reference number Kanyada/Kanyango/Kanya/1600 measuring approximately one decimal one four hectares (1.14 Ha) in area (The suit property herein).
2. The appeal was provoked by the trial court's ruling delivered on September 17, 2021 where the learned trial magistrate reasoned;
 - i. This suit is hereby stayed under section 6 of *Civil Procedure Act*, pending determination of Homabay ELC 55 of 2019.
 - ii. Parties to fast track the hearing of Homabay ELC 55 of 2019
 - iii. Owing to the nature of this matter, I shall make no order as to costs at this stage. Each party to bear its own costs.



3. The appellant was aggrieved by the trial court's decision. Therefore, he mounted the appeal by way of a memorandum of appeal dated January 5, 2022 based on twinned ground;
 - a. The learned honourable magistrate erred in law and in fact in finding that OS No 44 of 2020 was sub judice to ELC No 55 of 2019 while the two cases do not meet the threshold set out under section 6 of the [Civil Procedure Act](#).
 - b. The honourable learned magistrate erred in fact and in law in her finding by completely ignoring the fact that the appellant's case met all the particulars of adverse possession.
4. On that account, he is seeking the orders *infra*;
 - a. The ruling of the subordinate court issued on the September 17, 2021 be quashed and set aside.
 - b. The appellant has acquired the suit property adversely.
 - c. The title of the suit property be extinguished by virtue of the adverse possession and the suit property be registered in the appellant's name.
 - d. Costs of this appeal to be provided for in favour of the appellant.
5. On September 26, 2022, this court ordered and directed, *inter alia*;

“This appeal be heard by heard by written submissions.”
6. By the submissions dated October 27, 2022 and filed on even date, learned counsel for the appellant submitted that this appeal has merit. That the appellant has acquired the suit property by adverse possession and relied on the case of [Stephen Mwangi Gatunge-vs-Edwin Onesmus Wanjau](#) (2020) eKLR.
7. The respondent failed to file submissions herein. He was duly served on November 28, 2022 via email through his counsel, Peter M Warindu and Company Advocates as discerned in an affidavit of service sworn on November 28, 2022 by Odera Aluoch, the appellant's counsel.
8. It must be noted that by a plaint (fast track) dated October 24, 2019 and filed in court on October 25, 2019 as Homa Bay Chief Magistrate's Court Civil suit No 55 of 2019 (the first suit herein), the respondent is seeking *inter alia*, a permanent injunction against the appellant in respect of the suit property.
9. In his statement of defence dated February 1, 2022, the defendant who is the appellant herein, denied the first suit. He prayed that the same be dismissed with costs.
10. Similarly, the appellant sued the respondent by way of an originating summons dated July 2, 2020 and filed on even date at Homa Bay Chief Magistrate's Court Civil Suit No 55 of 2019. (The subsequent suit herein) claiming to have acquired title of the suit property by adverse possession.
11. The defendant who is the respondent herein, opposed the originating summons by way of his replying affidavit sworn on March 24, 2021. He deposed in part that he filed the subsequent suit herein seeking a permanent injunction against the appellant in respect of the suit property. Thus, he prayed that the originating summons suit be stayed or dismissed with costs



12. In reaching the impugned decision, the learned trial magistrate noted that the respondent's submissions were hinged upon the first suit which is still pending. Further, the court observed that the first and subsequent suits were similar and that;

“ A determination of either of them, will obviously render the other spent and of no further use. The law requires that in a situation such as this, a subsequent suit is stayed under Section 6 of Civil Procedure Act because of the rule of Res sub judice. In the case of Kenya Bankers Association versus Kenya Revenue Authority,2019 eKLR the court had this to say on the issue of Res sub judice...” (Emphasis added)
13. I have carefully considered the entire appeal as captured in the record of appeal herein as well as the appellant's submissions. So, is there merit in this appeal?
14. The learned trial magistrate relied on section 6 of the *Civil Procedure Act* chapter 21 laws of Kenya, the case of *Kenya Bankers Association-vs-Kenya Revenue Authority* (2013) eKLR alongside the case of *David Ndi and others-vs-Attorney General and others* (2021) KLR. Therefore, she reasoned as stated in paragraphs 2 and 12 hereinabove.
15. The doctrine of sub judice as stated in the impugned decision is housed in section 6 (supra) which reads;

“ No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”
16. Similarly, in *Black's Law Dictionary* 10th Edition at page 1652, the term ‘Sub judice’ means;

“ Before court or judge for determination.”
17. The learned trial magistrate bore in mind that the two suits involved the same parties and the same suit property. That therefore, they could not be heard simultaneously before the trial court.
18. In the case of the *Judicial Commission of Inquiry into the Goldenberg Affair and 3 others-vs-Kilach* (2003) eKLR 249 at 265/266, it was observed thus;

“It would not be right for the two matters to be heard simultaneously by the High Court and the Commission.....”
19. Pursuant to this court's orders of March 13, 2023, the original record of the first suit was availed and I perusal of the same alongside the entire record herein. It must be noted that the first suit and subsequent suits lodged in the trial court on different dates, involve the same parties. Basically, their dispute is over ownership of the suit property.
20. The appellant has urged this court to find that he has proved his adverse possession claim to the requisite standards. I take into account the original and appellate jurisdiction of this court over the first and subsequent suits under section 13 (1) of the *Environment and Land Court Act*, 2015 (2011) and the decision in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdallah Bakshwein and another* (2015) eKLR on the ingredients of adverse possession.



21. Besides, sections 5 and 11 of the *Civil Procedure Act* chapter 21 laws of Kenya provide for courts to try all civil suits unless barred and court in which suit is to be instituted respectively. This court has the mandate to remand a case under section 78 (1) (b) of the same Act.
22. In *Black's Law Dictionary* 10th Edition at page 1485, the term “remand” is defined as follows;

“An action or instance of sending a case or claim back for further action.”
23. Clearly, both the first and subsequent suits are yet to be determined on merits. The trial court ordered the parties to fast track the hearing of the first suit.
24. More importantly, article 159 (2) (b) of the *Constitution of Kenya, 2010* stipulates;

“Justice shall not be delayed.”
25. To that end, it is my considered view that the learned trial magistrate considered the record presented before her and the impugned judgment is in consonant with the law save for the trial court’s failure to render orders to meet the ends of justice hence the observation made in paragraphs 21, 22, 23 and 24 hereinabove is quite applicable in the obtaining circumstances. To that extent, I partially affirm the judgment.
26. Accordingly, this appeal is hereby partially dismissed.
27. Additionally, in the spirit of sections 1A, 1B, 3, 3A, 11 and 78 (1) (b) of the *Civil Procedure Act* chapter 21 laws of Kenya article 159 (2) (b) (supra) and section 3 of the *ELC Act, 2015* (2011), it is hereby ordered that.
 - a. The first suit and the subsequent suit be consolidated, heard and determined on merit before the trial court.
 - b. Mention of both suits before the trial court for directions on April 27, 2023.
 - c. Each party to bear his own costs of this appeal.
28. It is so ordered.

VIRTUALLY DELIVERED, DATED AND SIGNED AT HOMABAY THIS 22ND DAY OF MARCH, 2023

G. M.A ONG’ONDO

JUDGE

PRESENT

- a) S. Nyauke, learned counsel for the appellant.
- b) Okello and Mutiva, court assistants.

