



REPUBLIC OF KENYA



**Oteng & 2 others v Rakiro (Environment and Land Appeal
E024 of 2022) [2023] KEELC 16492 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E024 OF 2022
GMA ONGONDO, J
MARCH 22, 2023**

BETWEEN

**SILVANO OTUNGE OTENG 1ST APPELLANT
LAND REGISTRAR HOMA BAY 2ND APPELLANT
HON ATTORNEY GENERAL 3RD APPELLANT**

AND

ISABELLA BELLIAH RAKIRO RESPONDENT

*(Being an appeal from the judgment of Hon. E.M. Onzere, Principal
Magistrate, delivered on 29th June 2022 in Ndhiwa Principal
Magistrate's Court Environment and Land Case No. 36 of 2018)*

JUDGMENT

1. At the heart of the instant appeal is a portion of land reference number Kabonyo/Kwandiku/427 measuring approximately 12½ acres in area (the suit land herein). The same is located within Homa Bay County.
2. The 1st appellant is represented by the firm of W. O. Ochuka and Company Advocates.
3. The respondent is represented by the firm of H.O Mimba and Company Advocates.
4. In her judgment delivered on June 29, 2022, the learned trial magistrate held that the plaintiff (respondent herein) had proved her case to the requisite standard and issued the following orders:
 - a. The plaintiff is the lawful owner of L-shaped parcel of land being Kabonyo/Kwandiku/2098 measuring 8 acres.



- b. The 2nd defendant to cancel any corrections made on the original map ostensibly reflecting that the plaintiff's land belongs to the 1st defendant and the map to be as contained in the mutation forms dated 1994.
 - c. The plaintiff will have costs of the suit.
5. Aggrieved by the judgment, the appellant initiated this appeal by way of a memorandum of appeal dated July 18, 2022 and filed herein on even date premised on grounds 1 to 23 which include:
 - a. That the learned trial magistrate erred in law and in fact in failing to find that the appellant purchased 12½ acres of the suit land which is L-shaped on the ground.
 - b. That the learned magistrate erred in law and in fact in failing to find that the appellant purchased a much bigger portion of the suit land from Dalmas Ochumba Ologi (deceased) than the portion that the respondent purchased from the same Dalmas Ochumba Ologi (deceased).
 - c. That the learned magistrate erred in law and in fact applying Section 3(3) of the Law of Contract Act Cap 23 retrospectively.
 - d. That the learned magistrate erred in law and in fact in failing to find that the appellant had enjoyed a quiet and peaceful possession and occupation of L-shaped land parcel number Kabonyo/ Kwandiku/1929 measuring 12 ½ acres on the ground and was entitled to the parcel by virtue of the doctrine of adverse possession.
 - e. That the learned magistrate erred in law and in fact in failing to find that the suit was time barred and offended the mandatory provisions of Section 7 of Limitation of Actions Act.
 - f. That the learned magistrate erred in law and in fact by failing to appreciate that the respondent pleaded and prayed for amendment/correction of the map and was bound by her pleadings.
6. On that account, the appellant has sought that the instant appeal be allowed with costs and that the judgment of the learned trial magistrate be set aside with costs.
7. The appeal was heard by way of written submissions further to the court's directions of November 21, 2022.
8. The 1st appellant's counsel filed submissions dated January 16, 2023 on January 17, 2023. Counsel submitted that the trial magistrate erred in holding that the affidavit dated October 7, 1982 and sworn by the late Dalmas Ochumba (the deceased), in which he indicated that he sold 5 acres of land to the appellant, did not meet the threshold for an agreement for sale of land pursuant to the provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. Similarly, that the agreement dated August 11, 1989 also did not meet the criteria laid down in Section 3(3) (*supra*). That the amendment to the said section having been done on June 1, 2003, the trial magistrate applied the law retrospectively.
9. Learned counsel submitted that the evidence of possession by the appellant of the L-shaped portion of the suit land was uncontroverted. That as at December 4, 2014 when the suit was filed, the appellant had acquired prescriptive rights over the 12½ acres L-shaped land parcel number Kabonyo/ Kwandiku/1929. Further, that the respondent having acquired her portion of the suit land on June 8, 1994 and issued with a title deed on July 6, 1994, the suit was, at the time of filing, statute barred by dint of the provision of Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
10. Additionally, counsel submitted that the Land Surveyor (PW2) erred in drawing a mutation over land already occupied by the appellant, in the absence of the appellant, the deceased and owners



of neighbouring parcels. That the mutation that gave rise to the respondent's land parcel number Kabonyo/Kwandiku/2098 was drawn when the appellant had already acquired the 12 ½ acres L-shaped parcel by way of first registration and cannot therefore, supersede the appellant's rights over the same. That the error was on the map and not on the ground. Thus, counsel urged the court to allow the appeal and set aside the judgment of the trial court with costs. Counsel relied on various authorities, including the case of *Raila Amolo Odinga & Another -vs- IEBC & 2 others* (2017) eKLR, to buttress the submissions.

11. The respondent's counsel filed submissions dated October 30, 2022 on November 4, 2022. Briefly, learned counsel submitted that the 1st appellant encroached on the respondent's land, thereby increasing his portion of the suit land. That the instant appeal lacks merit, is an abuse of the court process and should be dismissed with costs to the respondent.
12. Notably, the 2nd and 3rd appellants did not participate in the instant appeal.
13. In the foregone, the issues for determination are as captured in the grounds of appeal and as compressed to:
 - a. Whether the instant appeal is tenable;
 - b. Is the appellant entitled to the orders sought in the memorandum of appeal?
14. It is noteworthy that it is the duty of this court herein to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another -vs- Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. -vs- Brown* (1970) EA 1.
15. Initially, Isabella Beliah Rakiro, the respondent herein, instituted a suit by way of a plaint dated December 4, 2014 and filed at the trial court on even date. The plaintiff contended that she is the registered owner of land parcel number Kabonyo/ Kwandiku/2098 measuring 3.2 Ha in area whilst the 1st defendant owns land parcel number Kabonyo/Kwandiku/1929 measuring 0.8 Ha in area. That both parcels emanated from the suit land. That during adjudication in 1994, the plaintiff's land was indicated as being on the defendant's land and vice versa on the sketch map and the map.
16. Thus, the plaintiff sought an order directing the correction of the error apparent on the map and the L-shape land be correctly shown as Kabonyo/ Kwandiku/2098 measuring 3.2 Ha in area belonging to the plaintiff and land parcel number Kabonyo/Kwandiku/1929 measuring 0.8 Ha in area belonging to the defendant. Also, the plaintiff prayed that the trial court enters judgment against the defendants by issuing the following orders:
 - a. A declaration that the plaintiff holds L-shaped land measuring 3.2 Ha approximately 8 acres of land parcel number Kabonyo/ Kwandiku/2098 and not Kabonyo/ Kwandiku/1929 on the ground and the maps be corrected by the 2nd defendant forthwith.
 - b. The plaintiff be allowed to take up L-shaped land as mapped on the ground and the error created by the mutation of the surveyor be corrected by the 2nd defendant.
 - c. Costs of the suit be provided.
17. PW1, the plaintiff/respondent herein, testified that she purchased land parcel number Kabonyo/ Kwandiku/2098 measuring approximately 3.2 Ha in area from the deceased in 1994. That in 2014, she received a letter instructing her to transfer her land to the appellant herein. That as a result, she lodged a complaint with the Land Registrar Homa Bay but did not get assisted as the said Land Registrar was biased. That she conducted a search which revealed that the appellant had purchased 2 acres of the suit land in 1992. She produced in evidence an agreement for sale of land dated June 8, 1994, application for



- consent of Land Control Board, Land Control Board consent, a copy of a mutation form dated June 20, 1994, a copy of title deed for land parcel number Kabonyo/ Kwandiku/2098 , a copy of a green card, a copy of search certificate for land parcel number Kabonyo/Kwandiku/1929 dated January 30, 2019
18. PW2, Solomon Njoga, a Surveyor testified that he was the one who went to the ground in 1994 to prepare the mutation forms. He stated that land parcel number Kabonyo/ Kwandiku/2098 which belongs to the plaintiff, is L-shaped and measures approximately 3.2 Ha on the ground. That therefore, the mutation forms reflect the findings on the ground. In cross-examination, PW2 stated that the parcel of land that was surveyed was number 427 as it had not been sub-divided. That owners of neighbouring parcels were not present during the visit.
 19. PW3, Philip Lore Damba, retired Chief, adopted his witness statement on record as part of his evidence. He stated that the plaintiff bought land parcel number Kabonyo/ Kwandiku/2098 measuring approximately 3.2 Ha in area from the deceased. On cross-examination, he stated that the plaintiff purchased her land in 1994 whilst the appellant herein purchased his land in 1982.
 20. In his statement of defence dated July 18, 2017 and filed on August 25, 2017, the 1st defendant denied the claim that land parcel number Kabonyo/ Kwandiku/2098 and Kabonyo/ Kwandiku/1929 were interchanged during mapping. He prayed for the dismissal of the plaintiffs' suit with costs.
 21. Similarly, the 2nd and 3rd defendants denied the claim through a statement of defence dated October 7, 2015 and filed on even date.
 22. DW1, Felix Odhiambo Adie, County Surveyor Homa Bay, testified that when they visited the site on September 23, 2014 following the complaint lodged by the plaintiff to the Land Registrar, land parcel numbers Kabonyo/ Kwandiku/2098 and Kabonyo/ Kwandiku/1929 were well demarcated. However, it was discovered that the image on the map was different from what was on the ground. He stated that the map ought to be corrected to reflect the position on the ground as it is not an authority on boundaries and is subject to amendments. That on the ground, the appellant's parcel is bigger than that of the respondent. He produced in evidence Surveyor's sketch map and Surveyor's report dated September 23, 2014 (DExhibits 1 and 2 respectively).
 23. DW2, Silvano Otunge Oteng, the 1st defendant/ appellant herein, testified that he purchased land parcel number Kabonyo/ Kwandiku/1929 in 1982 from the deceased. That he first bought 5 acres of land and later purchased an additional 6 acres. That further, he purchased additional land from the said deceased, hence he currently owns a total of 12.5 acres which is L-shaped. That he cultivates the land and has built a house thereon. He prayed that the suit be dismissed and the map be amended to reflect the ground position. He produced in evidence, a copy of title deed for land parcel number Kabonyo/ Kwandiku/1929, copy of affidavit sworn on October 7, 1982, sale agreement dated August 11, 1987, receipt dated April 16, 1987, letter dated April 25, 1995, a letter dated April 4, 1995 and a receipt dated August 25, 1995 (DExhibits 3 to 10 respectively).
 24. During cross-examination, DW2 admitted that he did not sign the agreement dated August 11, 1987. That further, the title deed produced in court shows the acreage of his portion of land as 5.08 Ha. That adjudication was done on the land in 1987 and titles processed based on the record. That in 2014 after the demise of the deceased, he paid some money to the land office for the amendment of the record. He averred that both parties occupy their respective parcels on the ground. That it is the Land Registry that swapped the land on the map.
 25. DW3, Stanslaus Odhumo, relied on his statement filed in court on February 21, 2019 which was adopted as his evidence-in-chief. In cross-examination, the witness stated that the appellant purchased



- 12.5 acres of land from the deceased. That there was a land sale agreement entered into and he was a witness to the said agreement.
26. DW4, Benter Adhiambo Ologi, a daughter-in-law to the deceased, relied on her statement filed in court on February 21, 2019 which was adopted as her evidence-in-chief. On cross-examination, DW4 stated that by the time she got married in 1991, the appellant had already purchased his portion of the suit land and was in occupation thereof.
27. Notably, the learned trial magistrate set out the parties' respective cases, framed four issues for determination, analysed them and arrived at the decision founded on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
28. In arriving at the impugned judgment, the learned trial magistrate observed at page 6 of the judgment that the agreement produced by the 1st defendant/appellant dated August 11, 1987 was not duly executed by the parties or witnessed by any witnesses. That the affidavit produced by the 1st defendant and dated October 7, 1982 in which the said Dalmis Otieno states that he sold 5 acres of the suit land to the 1st defendant is also not executed by the 1st defendant and has no witnesses. That although in the two aforesaid documents it is indicated that the land being sold is Kabonyo/Kwandiku/427, the 1st defendant did not produce any drawings or mutations to show how the subdivision of the suit land gave rise to his parcel Kabonyo/Kwandiku/1929. That searches for the two parcels of land clearly indicate that the plaintiff's land Kabonyo/Kwandiku/2098 was a subdivision of the suit land but there is no indication that land parcel number Kabonyo/Kwandiku/1929 was as a result of subdivision.
29. Regarding the confusion on the ground, the learned trial magistrate observed that there existed two contradictory expert reports by the Land Registrar Homabay and the Land Registrar, Kisii dated September 23, 2014 and September 2, 2015 respectively. The report by the Land Registrar Homabay dated September 23, 2014 was set aside by Hon. Justice Mutungi in his ruling dated April 13, 2016, citing doubt on the credibility of the proceedings held by the Land Registrar Homa Bay. In the report dated September 2, 2015, the Land Registrar Kisii in the company of Surveyor Homa Bay and private surveyors visited the land and concluded that basing on the documents produced and evidence gathered, land no. Kabonyo/Kwandiku/2098 is identifiable on the ground and it is well fenced and L-shaped. Thus, the trial magistrate held that the plaintiff had proved her case to the requisite standard.
30. The appellant contends that the learned magistrate erred in law and in fact by applying Section 3(3) of the [Law of Contract Act](#) Cap 23 retrospectively. That the affidavit and agreement dated October 7, 1982 and August 11, 1989 respectively came into existence before the amendment to the said section which was done on June 1, 2003.
31. Section 3(3) of the [Law of Contract Act](#) provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the [Law of Contract Act](#) excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the [Law of Contract Act](#), came into effect on June 1, 2003.
32. Prior to the amendment of Section 3(3) of the [Law of Contract Act](#) in 2003, the subsection read as follows:
- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum



or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

33. The appellant averred that in part performance of the sale agreement, he paid the purchase price in full, as acknowledged by the deceased in both the affidavit and the agreement. That he took possession of 12 ½ acres which is L-shaped from the year 1982 and subsequently from 1989 and continued to remain in possession to date.
34. Indeed, this court finds that Section 3 (3) of the *Law of Contract Act* came into effect in 2003 and does not apply to contracts for sale of land concluded before the same Section came into force. It is noted that the appellant did not lodge a counterclaim to the suit at the trial court.
35. Be that as it may, the suit filed by the respondent herein sought among other orders, a declaration that the plaintiff holds L-shaped land measuring 3.2 Ha approximately 8 acres of land parcel number Kabonyo/ Kwandiku/2098 and not Kabonyo/ Kwandiku/1929 on the ground. That the maps be corrected by the 2nd defendant forthwith.
36. The appellant avers that both land parcel number Kabonyo/Kwandiku/1929 and Kabonyo/ Kwandiku/2098 are resultant parcels from subdivision of the suit land. The same are registered in the names of the appellant and the respondent respectively.
37. The plaintiff produced in evidence, mutation forms clearly showing that the suit land was subdivided into two parcels to wit: Kabonyo/ Kwandiku/2097 measuring 4.1 Ha and Kabonyo/Kwandiku/2098 measuring 3.2 Ha. The latter parcel was subsequently transferred to the plaintiff and she produced in evidence, title deed to that effect (PEXhibit 5). In addition, the search relating to land parcel no. Kabonyo/ Kwandiku/2097 clearly shows that it was a subdivision of the suit land.
38. On the other hand, the appellant did not adduce any evidence to show how the subdivision of the suit land resulted to creation of his parcel of land, Kabonyo/ Kwandiku/1929. The search relating to the said parcel Kabonyo/ Kwandiku/1929 gives no indication that the said parcel is a subdivision of the suit land. The appellant stated that he raised an objection during the adjudication process which gave rise to parcel number Kabonyo/ Kwandiku/1929. However, no such proceedings were filed in court.
39. The appellant contends that the learned magistrate erred in law and in fact in failing to find that the appellant had enjoyed a quiet and peaceful possession and occupation of L-shaped land parcel number Kabonyo/ Kwandiku/1929 measuring 12 ½ acres on the ground. That he was entitled to the parcel by virtue of the doctrine of adverse possession.
40. In *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Baksbein and another* (2015) eKLR, the Court of Appeal held that adverse possession dictates thus;
- a. The parcel of land must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,



- c. The applicant must be 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. (Emphasis added)
41. I therefore, note that although the appellant herein may have been in occupation of land parcel number Kabonyo/ Kwandiku/1929 measuring 12 ½ acres on the ground for a period exceeding 12 years, the said land is registered in his name as per the copy of title deed produced in evidence (DExhibit 3). So, the appellant did not meet the threshold for acquisition of land by way of adverse possession.
42. Further, the appellant laments that the learned magistrate erred in law and in fact in failing to find that the suit was time barred and offended the mandatory provisions of Section 7 of Limitation of Actions Act, Chapter 22 Laws of Kenya. That the respondent having acquired her portion of the suit land on June 8, 1994 and issued with a title deed on July 6, 1994, the suit was at the time of filing statute barred by dint of the provision of Section 7 (*supra*).
43. It is noted from the pleadings and evidence on record that the cause of action arose in 2014 when the respondent received communication from the Surveyor that they wanted to change the land parcel numbers. The respondent lodged a complaint with the Land Registrar, Homa Bay and subsequently filed the suit at the trial court when the said office failed to objectively address the complaint. The appellant himself indicated that in 2014, he paid some money to the land office for amendment of the record as stated in paragraph 24 hereinabove. Therefore, it is the finding of this court that the claim was not time barred.
44. The appellant avers that the learned magistrate erred in law and in fact by failing to appreciate that the respondent pleaded and prayed for amendment/correction of the map and was bound by her pleadings. This court subscribes to the decision in *Odd Jobs –vs- Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision; see also *Vyas Industries –vs- Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
45. It is important to note that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue; see Sections 107 to 109 of the Evidence Act, Chapter 80 Laws of Kenya.
46. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, having taken into account the entire evidence on record in this appeal, the facts of the case as well as the legal principles stated above, the respondent who was the plaintiff before the trial court proved that she is the lawful owner of land parcel number Kabonyo/ Kwandiku/2098 measuring 3.2 Ha in area. I therefore, would endorse the learned trial magistrate’s finding.
47. In conclusion, it is the considered view of this court that the learned trial magistrate’s judgment is unfaulty at law. I proceed to uphold the same in entirety.
48. Wherefore, the instant appeal originated by way of a memorandum of appeal dated July 18, 2022 and duly filed on even date, be and is hereby dismissed.
49. The proviso to Section 27(1) of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that costs follow the event, within the discretion of the court. So, the appellant shall bear the costs of this appeal and the costs arising out of the proceedings at the trial court.
50. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 22ND DAY OF MARCH 2023.



G.M.A ONG'ONDO

JUDGE

Present;

1. Appellant
2. Respondent
3. Ms. Mimba, Learned Counsel for the respondent
4. Mr. Alego holding brief for Ochuka, Learned Counsel for the appellant
5. Okello, Court Assistant

