



REPUBLIC OF KENYA



**KENYA LAW**  
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**Dianga v Akongo (Environment and Land Appeal E022 of 2021)  
[2023] KEELC 19271 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 19271 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E022 OF 2021  
GMA ONGONDO, J  
APRIL 18, 2023**

**BETWEEN**

**BENARD OTIENO DIANGA ..... APPELLANT**

**AND**

**JAMES ODHIAMBO AKONGO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. B. O. Omwansa, Senior Principal Magistrate, delivered on 23rd November 2021 in Oyugis Senior Principal Magistrate's Court Environment and Land Case No. 68 of 2018)*

**JUDGMENT**

1. This is an appeal that arises from the trial court's judgment delivered on the 23<sup>rd</sup> November 2021 by the Honourable B. O. Omwansa, Senior Principal Magistrate, in Oyugis Senior Principal Magistrate's Court Environment and Land Case No. 68 of 2018 where he held, *inter alia*;
  - a. That an order of specific performance is hereby issued directing the plaintiff/defendant to curve out and transfer a portion of land measuring 3 acres from parcel number West Kasipul/Konuonga/ 563 (the suit land herein) within 90 days to the defendant/plaintiff fail to which the aggrieved party is to move the court appropriately.
  - b. Each party bear own costs.
2. The appellant namely Benard Otieno Diang'a through the firm of Mwamu and Company Advocates mounted the appeal by way of a memorandum of appeal dated 23<sup>rd</sup> December 2021 and filed herein on even date. The Appeal is anchored on grounds 1 to 9 as set out on the face thereof and the same include:
  - a. That the Senior Principal Magistrate erred in law and fact by lowering the standard required to prove proprietorship of land.



- b. The Senior Principal Magistrate arrived at erroneous finding since the plaintiff was the original owner of the suit land.
  - c. That the Senior Principal Magistrate misinterpreted adverse possession.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed with costs.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 21<sup>st</sup> September 2022.
5. Accordingly, the appellant's counsel filed submissions dated 25<sup>th</sup> October 2022 on 7<sup>th</sup> November 2022 and identified twin issues for determination thus:
  - a. Whether the trial magistrate erred in law and fact by incorrectly applying the law and ignoring, failing to consider the evidence adduced by the appellant and hence arriving at a decision which was against the weight of evidence.
  - b. Whether the trial magistrate misinterpreted adverse possession.
6. In discussing the issues, learned counsel submitted, *inter alia*, that the appellant is the legal owner of the suit land, having inherited the same from the estate of his late father. That although the respondent claims to have purchased 3 acres out of the suit land, the same was not proven as the agreement for sale dated 23<sup>rd</sup> August 1983 relates to a different parcel of land and not the suit land. That further, the respondent did not adduce proof of attending a Land Control Board for consent to subdivide the suit land thus, the purported sale was incomplete and his occupation of the suit land was illegal *ab initio*.
7. Counsel also submitted that the respondent only took possession of the suit land in 2016, a year before the suit was instituted at the trial court. That therefore, the respondent did not meet the threshold of 12 years to sustain a claim for adverse possession. Counsel cited various authorities including [\*Kenya Power & Lighting Company Ltd. -vs- E K O & another\*](#) (2018) eKLR, to buttress his submissions.
8. Bana and Company Advocates, learned counsel for the respondent, filed submissions dated 6<sup>th</sup> March 2023 on 7<sup>th</sup> March 2023. Counsel submitted that indeed, the agreement for sale dated 23<sup>rd</sup> August 1983 was valid and enforceable as held by the trial court. That although the title number was wrongly indicated, the appellant himself confirmed at the trial court that his late father only had one parcel of land, the suit land herein. That therefore, the agreement could not have been in relation to any other parcel of land. That the same issue was also resolved by the court in Criminal Case No. 161 of 2016 in which the court also found that indeed, the respondent had been in occupation of the suit land since 1983 and not 25<sup>th</sup> March 2016 as alleged by the complainant/ appellant herein.
9. It was counsel's submission that the learned trial magistrate declined to grant the relief of adverse possession, instead holding that the respondent had proved the existence of a constructive trust. Thus, counsel prayed that the instant appeal be dismissed with costs both at this court and in the trial court. Counsel relied on the case of [\*Willy Kimutai Kitilit -vs- Michael Kibet\*](#) (2018) eKLR, to fortify the submissions.
10. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
  - a. Has demonstrated that this appeal is tenable and
  - b. Is entitled to the orders sought in the memorandum of appeal.



11. It must be noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni-vs Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in other cases, *inter alia*, *Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
12. At the trial court, the suit was commenced by way of a plaint dated 25<sup>th</sup> January 2017 mounted by the plaintiff/appellant against the defendant/respondent seeking the following orders:
  - a. Declaration that the plaintiff is the registered and/or lawful owner of the suit land.
  - b. Permanent injunction restraining the defendant either by themselves, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering, cultivating, trespassing onto, fencing, interfering with and/or in any way other manner dealing with the suit land.
  - c. General damages for trespass.
  - d. Costs of this suit be borne by the defendant.
13. PW1, Benard Otieno Dianga (the appellant herein), adopted his statement dated 25<sup>th</sup> January 2017 as part of his evidence. He also produced in evidence, a title deed in respect of the suit land, a certificate of official search, a letter dated 24<sup>th</sup> April 2015, a copy of judgment from Oyugis Senior Principal Magistrate's Court Criminal Case No. 161 of 2016 and photographs showing how the defendant trespassed onto the suit land (PExhibits 1 to 5 respectively). He testified that he was unaware that the defendant had purchased a portion of the suit land from his late father.
14. In cross-examination, PW1 admitted that at the time of his father's demise, he was still a minor aged 16 years old. That the defendant was acquitted of trespass charges in Oyugis Senior Principal Magistrate's Court Criminal Case No. 161 of 2016. He further stated that his father only owned one parcel of land, the suit land herein. Also, he asserted that there are banana plants on the suit land.
15. In the amended statement of defence and counterclaim dated 21<sup>st</sup> February 2020, the defendant denied the claim and prayed that the same be dismissed with costs. He stated that the plaintiff became a proprietor of the suit land in 2014 following a probate and administration process of the estate of his late father, Dianga Ochich (the deceased). That he purchased a portion of the suit land on 23<sup>rd</sup> August 1983 from the deceased and has been utilizing the same since then to date. In his counterclaim, the defendant sought the following orders:
  - a. An order of specific performance, compelling the plaintiff to transfer 3 acres to the defendant from the suit land.
  - b. Costs and
  - c. Interest
16. DW1, James Odhiambo Akongo, the defendant/respondent herein testified that he purchased a portion of the suit land measuring 3 acres in area in August 1983 from the deceased. That the purchase price was Kshs.36,000 which he paid in one installment. That he thereafter took possession of the said portion and has been tilling it to date. He stated that the sale agreement erroneously made reference to land parcel number Konuonga/53 instead of the suit land herein.
17. In cross-examination, DW1 stated that he does not live on the suit land. That the portion of the suit land is tilled by his mother or wife. Also, that he did not sign the land transfer forms. With regards to the sale agreement, the witness stated that it was not signed by the seller who instead put his thumbprint. By consent, DW1 produced in evidence sale of land agreement, a copy of judgment in Oyugis Senior



Principal Magistrate's Court Criminal Case No. 161 of 2016 and a letter from the Land Registrar (DExhibits 1, 2 and 3 respectively).

18. DW2, Lawrence Oluoch Mbaka, a retired chief for Konuonga Location adopted his statement dated 19<sup>th</sup> February 2021 as part of his evidence. He testified that he knew the late Jared Opondo Oketch who witnessed the execution of DExhibit 1. He confirmed that the signature on DExhibit 1 indeed belonged to the said Jared. He averred that the deceased only owned the suit land and he sold a portion of the same to the defendant. He also stated that the defendant has been in occupation of the portion sold to him since 1983.
19. On cross-examination, DW2 stated that he was the Assistant Chief of Kotieno Sub-location in 1981 and not Konuonga Sub-location where the suit land is situated. That he was not in custody of the files as he was not the Chief of the location. Also, he admitted that he did not know the parcel number of the land which was sold to the defendant.
20. Opiyo Onyango, DW3, a witness to the sale agreement (DExhibit 1) recalled that the deceased sold a portion of the suit land to the defendant. That the portion was given to the defendant and the witnesses planted sisal along the boundary. That the defendant took possession thereof and has been cultivating the suit land since 1983. He further averred that the deceased owned only one piece of land, to wit, the suit land herein.
21. In cross-examination, DW3 stated that he is 78 years old. He admitted that there are some things that he cannot remember.
22. The appellant contends that the Senior Principal Magistrate erred in law and fact by lowering the standard required to prove proprietorship of land. The learned trial magistrate held at page 6 of the judgment thus:

“...it is thus my view that indeed the defendant/plaintiff has demonstrated that he purchased the parcel of land... the agreement produced as an exhibit in this court was authenticated... In addition, the court siphons from the evidence adduced that the title deed to the plaintiff/defendant was issued when the defendant/plaintiff was in occupation of this portion of land. It is for these reasons I will infer that the plaintiff/defendant is holding the title in trust for the defendant/plaintiff...”
23. I note that the validity of a contract is paramount more so, where a prayer for specific performance has been made. Indeed, the authenticity of DExhibit 1 was corroborated, particularly by DW3 who was a witness to the execution of the same. The defendant's assertion that he paid Kshs.36,000 as consideration for purchase of a portion of the suit land was also unchallenged. Further, the defendant proved that he was in possession of the said portion of the suit land.
24. In *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR, the court stated in part:

“...A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (*supra*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.”
25. In *Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri* [2014] eKLR, the Court of Appeal sitting at Nyeri, held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent. The court further



- stated that that the possession of the land by purchasers was an overriding interest in favour of the purchasers.
26. This court subscribes to the Court of Appeal’s decision in *Willy Kimutai Kitilit* (*supra*) where the court held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust. The court noted that:
- “...since the current *Constitution* has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board...”
27. It is therefore, this court’s considered view that the defendant proved, to the requisite standard, the existence of a constructive trust over a portion of the suit land measuring 3 acres in area.
28. The appellant laments that the Senior Principal Magistrate arrived at erroneous finding since he was the original owner of the suit land. I, however, note from the evidence on record that the appellant became a proprietor of the suit land in 2014 following a succession of the estate of his late father, Dianga Ochich (the deceased). That by the time the registration of the title was done in the appellant’s name, the respondent was already in possession of a portion of the suit land measuring 3 acres in area. It is therefore, this court’s considered view and as held in *Willy Kimutai Kitilit case* (*supra*) that by the time the appellant caused himself to be registered as the proprietor of the entire suit land, he was a constructive trustee for the respondent.
29. The appellant further laments that the Senior Principal Magistrate misinterpreted adverse possession. In arriving at the impugned judgment, the learned trial magistrate noted as below with regards to the defendant’s claim of adverse possession;
- “...I find that a claim of adverse possession was supposed to be brought in by the defendant/ plaintiff on his own, not to wait up and until an eminent eviction is pending, for him to slip and/or sneak in the adverse possession claim...”
30. Therefore, as rightly submitted by counsel for the respondent, the learned trial magistrate declined to grant the relief of adverse possession, instead holding that the respondent had proved the existence of a constructive trust over a portion of the suit land.
31. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
32. I, thus, endorse the learned trial magistrate’s considered finding that the appellant is holding the title to the portion of the suit land in trust for the respondent.
33. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the appellant who was the plaintiff before the trial court failed to prove that the respondent is a trespasser on the suit land. As a consequence, an injunctive



order restraining the respondent, their agents, representatives, assigns or any person acting or deriving authority from the respondent from accessing the suit land, could not issue.

34. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I proceed to uphold the same.
35. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated memorandum of appeal dated 23<sup>rd</sup> December 2021 and filed herein on even date is hereby dismissed with costs to the respondent.
36. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

**G. M. A. ONG'ONDO**

**JUDGE**

Present

1. Ms. Nyakwana, Learned Counsel for the Appellant
2. Mr. Ojala holding brief for Mr. Bana, Learned Counsel for the Respondent
3. Appellant
4. Respondent
5. Ochumba, Court Assistant

