



Onyuka (Suing as the legal representative of Onyuka Ogalo) v Ogweno (Sued as the legal representative of George Ogweno) (Environment and Land Appeal E012 of 2022) [2023] KEELC 19270 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEELC 19270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E012 OF 2022
GMA ONGONDO, J
APRIL 18, 2023**

BETWEEN

ROSE AKEYO ONYUKA (SUING AS THE LEGAL REPRESENTATIVE OF ONYUKA OGALO) APPELLANT

AND

MARTIN OMONDI OGWENO (SUED AS THE LEGAL REPRESENTATIVE OF GEORGE OGWENO) RESPONDENT

(Being an appeal from the judgment of Hon. Celesa Okore, Principal Magistrate, delivered on 17th March, 2022 in Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. E006 of 2022)

JUDGMENT

1. The instant appeal arose from the trial court’s judgment delivered on the 17th March 2022 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Senior Principal Magistrate’s Court Environment and Land Case No E006 of 2022 where the learned trial magistrate held, inter alia;

“... I find and hold that the plaintiff has dismally failed to prove her case on a balance of probabilities against the defendant. The plaintiff’s suit is hereby dismissed accordingly. However, for interests of justice and the need to keep the family fabric intact, the court is allowing the proposal by the defendant to donate to the plaintiff ½ an acre of the suit land as already intimated in issue (iv) above. Each party shall bear its own costs.”

2. Being aggrieved by the said judgment, the appellant namely Rose Akeyo Onyuka through the firm of G. S. Okoth and Company Advocates mounted the instant appeal by way of a memorandum of appeal dated 8th April 2022 and duly filed on 14th April 2022. The Appeal is anchored on grounds 1 to 7 as set out on the face thereof and these include:



- a. The learned trial magistrate erred in law in holding that the fact that the plaintiff does not know the exact acreage of the area she is occupying because she has not measured the same can prevent her from acquiring title to the same when the same can be surveyed and size determined.
 - b. The learned trial magistrate misdirected herself in construing the meaning of trust in land law by failing to note that if a person in possession has overriding interest and/or has acquired the title by adverse possession, the registered proprietor is said to be holding his title in trust for the person in occupation and possession.
 - c. The learned trial magistrate erred in law in interpreting what constitutes adverse possession and failing to note that the defendant himself stated that “the plaintiff had grabbed more land than she was allocated, to an extent of denying me a place to build my home and she has turned violent towards me”, and that it is the extra land that the plaintiff has acquired title to by adverse possession.
 - d. The learned trial magistrate erred in law of succession in failing to note that to-date the defendant/respondent has not obtained a grant of letters of administration intestate to the estate of George Ogweno which would entitle him to distribute the estate; and that the limited grant of letters of administration ad litem which he has was only issued to him by the court following a citation filed by the appellant which is only limited to giving the respondent powers to defend this suit and not be able to distribute the property.
3. Wherefore, the appellant has sought that this court to quash the decision of the trial court, set aside the judgment decree and orders made therein save for the order of costs and make the following orders:
 - a. An order that the area allegedly “grabbed” by the plaintiff be surveyed and the measurement be determined and thereafter a declaration be made that the appellant has acquired title to the same by adverse possession.
 - b. The same be annexed to the ½ acre on which the appellant lawfully resides and a title deed be issued thereto.
 4. The appeal was heard by way of written submissions. The appellant’s counsel filed submissions dated 14th December 2022 on even date and identified four issues to wit: whether the respondent had authority to permit the appellant to use land parcel No West Karachuonyo/Kokoth ‘A’/88 (the suit land herein); whether the appellant had acquired half of the suit land by way of adverse possession; whether the appellant knowing the size of the suit land is a prerequisite in a claim for adverse possession; and who bears the cost of the appeal?
 5. Learned counsel submitted that the respondent never had the authority to sanction the appellant’s entry onto the suit land as he was neither the registered proprietor of the same nor had he obtained grant of letters of administration intestate to the Estate of George Ogweno (deceased) by the year 1997 when the appellant moved onto the land. That the respondent was issued with grant ad litem in 2020, nearly 23 years after the appellant occupied the suit land. That further, the grant so issued limits the respondent to only instituting or defending a suit on behalf of the estate of George Ogweno but does not entitle him to manage, distribute or permit others to use the deceased’s estate.
 6. Also, counsel stated that although the appellant and her husband started occupying the portion of the suit land measuring ½ an acre where her homestead is built with the permission of the owner George Ogweno (deceased), she has been cultivating an area of the suit land exceeding 3 acres. That therefore, she has acquired the said area by way of adverse possession, making her entitled to a portion of the suit land measuring 4 acres in area. Counsel submitted that as long as the area possessed can be determined



either by survey or measurements, the same can be acquired by way of adverse possession. Counsel relied on various authorities including *Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch* (2021) eKLR, to fortify the submissions.

7. Odondi and Company Advocates, learned counsel for the respondent, filed submissions dated 16th February 2023 on 17th February 2023. Counsel submitted that the appellant admitted to claiming 1 acre of land in Migori Environment and Land Case No 882 of 2017, as opposed to the 4 acres being claimed in the instant appeal. That the respondent's family freely donated ½ acre of the suit land to the appellant as the land owned by the family of the appellant was not suitable for erecting a home.
8. It was counsel's submission that in Criminal Case No 104 of 2016 at Oyugis Law Courts, the appellant was charged with the offence of malicious damage to property. That also, the respondent is not duty bound to take out letters of administration to the estate of George Ogweno (deceased) since he is not the eldest son. Thus, counsel urged the court to dismiss the instant appeal with costs. Reliance was placed on the case of Peter Okoth (*supra*), to buttress the submissions.
9. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to consider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. v Brown* (1970) EA 1.
10. It must be noted that the suit was commenced by way of a plaint dated 28th September 2020 and filed in court on 22nd October 2020 by the plaintiff (appellant herein) seeking the following orders;
 - a. An order of declaration that the late George Ogweno held title to a portion of the suit land in constructive trust for the late Caleb Onyuka Ogalo whose family has occupied and been in possession of a portion measuring approximately 1.6 hectares (4.0 acres) of the said land for a period of about 22 years and has an overriding interest.
 - b. An order do issue for the rectification of the register of the suit land by adding the name of Rose Akeyo Onyuka as proprietor in common of equal undivided share measuring approximately 1.6 hectares of the said land.

Or Alternatively the court do issue an order compelling the defendant as the administrator of the estate of George Ogweno to subdivide the suit land into two parts of 1.6 hectares each and transfer a portion measuring 1.6 hectares to the plaintiff.
 - c. In The Alternative should a constructive trust not be declared, the court do make a declaration that the plaintiff as the widow and administratrix of Caleb Onyuka Ogalo has acquired title to a portion of the suit land measuring approximately 1.6 hectares by adverse possession.
 - d. Costs of this suit together with interest thereon as provided by Section 27(2) of the *Civil Procedure Act*.
 - e. Such further or other alternative relief as this honourable court deems fit to grant.
11. PW1, Rose Akeyo Onyuka, who was the plaintiff before the trial court, relied on her statement dated 28th September as part of her evidence and testified that she has been occupying and cultivating half the suit land since 1997 to date. She produced in evidence, a copy of limited grant for the plaintiff, a copy of the limited grant for the defendant, a copy of the search certificate for the suit land, a copy of death certificate for Onyuka Ogalo, a copy of death certificate for Turfino and court ruling (PEXhibits 1 to 6 respectively).



12. In cross-examination, PW1 stated that she did not know the acreage of the portion of the suit land that she was claiming. That in Migori ELC Suit No 882 of 2017, she claimed one acre while in the present suit she was asking the court to award her 4 acres. She admitted that the defendant's father gave her husband the portion of the suit land when they had nowhere to stay as the Kowuor clan which her family belongs to regarded her late husband as a cursed person. She also stated that she was aware that the defendant was ready to transfer to her the portion that she occupies.
13. PW2, Caleb Onyuka, adopted his statement on record as part of his evidence. He stated that he knows Kowuor Clan, though he comes from a different clan. During cross-examination, PW2 stated that the plaintiff was given the portion she occupies by the defendant's father. He initially averred that the portion being claimed by the plaintiff measures approximately 3 acres but later stated that the plaintiff was claiming an area measuring 1 acre and that the rest of the suit land ought to remain with the defendant and his family. He further stated that the plaintiff has another land registered in her name.
14. PW3, Lazarus Oriaso Onyuka, the plaintiff's son, adopted his statement on record as his evidence in chief. During cross-examination, the witness stated that they moved into the suit land in 1997. That they have another land registered in his grandmother's name, which land measures 0.9 Ha in area. That the Kowuor clan has made attempts at solving the instant dispute. He further admitted being aware that the defendant was ready to give them the portion of the suit land where they are presently staying.
15. On 9th March 2021, the defendant filed a statement of defence dated 8th March 2021 denying the claim and prayed that the suit be dismissed with costs.
16. The defendant (DW1) who is the respondent herein testified on 27th January 2022 and adopted his statement dated 14th July 2021 as part of his evidence. He testified that the plaintiff is his aunt. That the plaintiff was given a portion of the suit land measuring ½ an acre as the plaintiff's husband could not erect his homestead behind the parents' homestead in line with Luo customs. That in Migori ELC Suit No 882 of 2017, the plaintiff's claim was over a portion of the suit land measuring one acre whilst in the present suit she is claiming a portion measuring 4 acres. That they have had cases of crop damages and police cases over the suit land.
17. He produced in evidence a copy of the originating summons in Migori ELC Suit No 882 of 2017, Supporting Affidavit in Migori ELC Suit No 882 of 2017, Minutes of the meeting dated 5th March 2017, Letter from FIDA, Minutes dated 11th October 2016, Chief's letter dated 18th April 2016, Chief's letter dated 3rd April 2017 and death certificate (DExhibits 1 to 8 respectively).
18. During cross-examination, DW1 admitted that he gave the plaintiff a portion of the suit land measuring ½ an acre which he is willing to leave to her. That the plaintiff has encroached onto a further 2 acres of the suit land. That the said trespass by the plaintiff started in 2016. Further, that he has never brought an action in court seeking to evict the plaintiff from the suit land.
19. It is important to note that the learned trial magistrate stated the parties' respective cases, delineated five issues for determination, discussed them and reached her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
20. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether there exists a constructive trust over the suit land in favour of the appellant;
 - b. Whether the appellant has acquired by way of adverse possession, a portion of the suit land measuring 1.6 Ha in area;



- c. Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
 - d. What final orders can this court make to meet the ends of justice?
21. On the first issue, the appellant contends that the learned trial magistrate misdirected herself in construing the meaning of trust in land law by failing to note that if a person in possession has overriding interest and/or has acquired the title by adverse possession, the registered proprietor is said to be holding his title in trust for the person in occupation and possession.
 22. From the pleadings, the plaintiff had sought an order for the rectification of the register of the suit land by adding the name of Rose Akeyo Onyuka as proprietor in common of equal undivided share measuring approximately 1.6 hectares of the said land. Alternatively, that the court do issue an order compelling the defendant as the administrator of the estate of George Ogweno to subdivide the suit land into two parts of 1.6 hectares each and transfer a portion measuring 1.6 hectares to the plaintiff.
 23. In arriving at the impugned judgment, the learned trial magistrate observed that the official search certificate produced as PExhibit 3 did not support the plaintiff's assertion that there existed a trust. That there was no evidence whatsoever that the defendant's late father one George Ogweno held the suit land in trust for the late Onyuka Ogalo, and that they were to share the same equally.
 24. This court is cognizant of Section 28 of the [Land Registration Act, 2016](#) (2012), which stipulates that all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.
 25. In [Twalib Hatayan & another v Said Saggar 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.”
 26. In the instant appeal, there was no sale of the suit land. DW1 testified that he freely donated a portion of the suit land measuring ½ an acre to the plaintiff. That the said donation was necessitated by the Luo customs that did not allow the plaintiff's homestead to be erected behind the mother's homestead. DW1 did not lay claim to the donated portion. This was corroborated by the appellant, who stated that she started occupying the portion of the suit land measuring ½ an acre where her homestead is built with the permission of the owner, the defendant's father, George Ogweno (deceased). It is therefore, the court's view that the appellant did not prove the existence of a trust; see [Willy Kimutai Kitilit v Michael Kibet](#) (2018) eKLR.
 27. As regards the second issue, the appellant lamented that the learned trial magistrate erred in law in interpreting what constitutes adverse possession and failing to note that the defendant himself stated that “the plaintiff had grabbed more land than she was allocated, to an extent of denying me a place to build my home and she has turned violent towards me”, and that it is the extra land that the plaintiff has acquired title to by adverse possession.
 28. One of the prayers sought by the appellant herein at the trial court was that should a constructive trust not be declared, the court do make a declaration that the plaintiff as the widow and administratrix



- of Caleb Onyuka Ogalo has acquired title to a portion of the suit land measuring approximately 1.6 hectares by adverse possession.
29. On the said issue, the learned trial magistrate noted that the plaintiff entered the suit land with the permission of the defendant, as was confirmed by both parties. That the defendant donated a portion of the suit land measuring ½ an acre to the plaintiff. Thus, the trial magistrate held at page 7 of the judgment that:
- “...the issue of adverse possession does not therefore arise in the present case...”
30. In *Wilson Kazungu Katana and 101 others v Salim Abdalla Baksbein and another* (2015) eKLR the court stated 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.
31. Both the appellant and respondent admitted that the appellant’s entry onto the suit land was with the permission of the respondent’s family. The appellant’s counsel submitted that although the appellant and her husband started occupying the portion of the suit land measuring ½ an acre where her homestead is built with the permission of the owner George Ogwen (deceased), she has been cultivating an area of the suit land exceeding 3 acres. That therefore, she has acquired the said area by way of adverse possession, making her entitle to a portion of the suit land measuring 4 acres in area.
32. Indeed, DW1 stated during cross-examination that the parties do not live in peace and that the appellant had encroached onto the remaining portion of suit land. He stated thus:
- “...she has encroached into an extra 2 acres of my land...”
33. Notably, DW1 also stated that such encroachment began in the year 2016. He stated thus:
- “...she has encroached for 6 years now... she started trespassing to my land in 2016...”
34. I also note from DExhibits 3 and 6 that there were attempts by the Kowuor Clan to resolve the dispute, the subject of the instant appeal. This is in line with Article 159 (2) (c) and (3) of the *Constitution* of Kenya, 2010.
35. The appellant did not adduce sufficient evidence to prove that she has been in occupation of the extra portion of the suit land for a period in excess of 12 years. Thus, the assertion by the respondent (DW1) that the appellant first trespassed onto the remainder of the suit property in 2016 is treated as gospel truth. Therefore, the threshold for acquisition of the said portion by way of adverse possession has not been met.
36. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Sections 107 to 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
37. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, did the appellant prove to the requisite standard, her case before the trial court?



38. Having taken into account the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above, the appellant who was the plaintiff before the trial court did not prove her case as required by law. I therefore, would endorse the learned trial magistrate's holding.
39. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I hereby uphold it in entirety.
40. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 8th April 2022 and duly filed on 14th April 2022, be and is hereby dismissed.
41. By dint of the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of this appeal to be borne by the appellant.
42. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 18TH DAY OF APRIL 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Appellant
2. Ms. Nyakwana holding brief for G. S. Okoth, Learned Counsel for the appellant
3. Ms. Kijana holding brief for Odoni Awino, Learned Counsel for the respondent
4. Ochumba, Court Assistant

