



Okeyo (Suing as the administratrix of the Estate of David Okeyo Mbuge - Deceased) v Onyango (Environment & Land Case 59 of 2021) [2023] KEELC 19272 (KLR) (17 April 2023) (Judgment)

Neutral citation: [2023] KEELC 19272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 59 OF 2021
GMA ONGONDO, J
APRIL 17, 2023
(FORMERLY MIGORI ELC NO. 34 OF 2020 (O.S))**

BETWEEN

Jael Akinyi Okeyo (Suing as the Administratrix of the Estate of David Okeyo Mbuge - Deceased) PLAINTIFF

AND

Samson Ogolla Onyango DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number West Kasipul/Kasimba/1936 measuring approximately zero decimal one three hectares (0.13 Ha) in area and contained in Registry Map sheet number 2 (The suit land herein). The same is located within Homa Bay County.
2. The plaintiff is represented by the firm of Ochillo and Company Advocates.
3. The defendant is acting in person.

B. Summary of the Parties' Respective Cases

4. On 10th July 2020, the plaintiff, through her Advocates, filed the present suit by way of an Originating Summons dated 28th January 2020. The same was brought pursuant to Order 37 Rule 7 of the *Civil Procedure Rules, 2010* and Section 38 of the *Limitations of Actions Act* Chapter 22 Laws of Kenya.
5. The plaintiff has sought the orders infra:
 - a. A declaration that the defendant's right to recover the entire suit land is barred under the *Limitations of Actions Act*, Chapter 22 Laws of Kenya, and his title thereto extinguished on the ground that the plaintiff and her deceased husband herein had openly, peacefully and



continuously been in occupation and possession of the aforesaid title for a period exceeding 20 years.

- b. That there be an order that the plaintiff be registered as the proprietor of the entire suit land in place of the defendant.
 - c. That there be an order restraining the defendant by himself, his agents, servants or anyone claiming through him from interfering with the plaintiff's peaceful possession and occupation of the said title in any manner whatsoever and/or howsoever.
 - d. Costs of this originating summons be borne by the defendant.
 - e. Such further and/or other orders as may be made by this honourable court as it deems fit and expedient in the circumstances of this case.
6. The originating summons is anchored on an eighteen (18) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff's lamentation is that she has acquired by adverse possession, the suit land which is registered in the name of the defendant. She contends that together with her deceased husband, they have been in occupation of the suit land since 2003. That they have fenced the land, constructed a permanent house and pit latrine, planted trees and dug a well thereon.
 7. The plaintiff asserted that she has been in sole and exclusive possession and use of the suit land for a period exceeding 12 years, which occupation has been open, continuous, uninterrupted and peaceful. That in 2017, the defendant brought interested buyers to the suit land and threatened to demolish the plaintiff's house. That therefore, the plaintiff stands to suffer irreparable loss should the court not grant the orders as prayed.
 8. The defendant opposed the suit vide a statement of defence dated 3rd August 2020 and duly lodged on even date. He asserted that indeed the plaintiff has put up structures on the suit land, although she does not have title to the same. He urged the court to compel the plaintiff to vacate the suit land and compensate him for illegally occupying the premises. That the plaintiff's occupation has not been uninterrupted, as he has lodged various complaints including one at the chief's office- Kokech Location.
 9. On 2nd November 2021, this matter was transferred from Migori Environment and Land Court where it had been filed to this court for hearing and determination.
 10. On 16th November 2022, upon hearing parties, this honourable court directed that the hearing of the suit be conducted by way of affidavit evidence and written submissions.
 11. Accordingly, learned counsel for the plaintiff filed submissions dated 20th November 2022 on 10th February 2023 and identified three issues for determination, to wit, whether the plaintiff has met the threshold for grant of orders for adverse possession, whether the plaintiff is entitled to the ownership or a portion thereof of the suit land by adverse possession and who should bear the costs of the suit. Counsel submitted that the plaintiff's occupation of the suit land has been open, without secrecy and with the sole intention of acquiring ownership. That the instant case is merited and ought to be allowed with costs. Counsel relied on various authorities including the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another* (2015) eKLR, to fortify the submissions.
 12. The defendant filed submissions dated 13th February 2022 on even date, urging the court to dismiss the plaintiff's claim. That the suit land does not belong to the plaintiff as the title is not in her name. Further, he prayed that the court do issue an order prohibiting the plaintiff from entering, cultivating, constructing or in any way dealing with the suit land.



C. Issues for Determination

13. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd v Falcon Grounds Ltd* (2000) 2 EA 385 and Order 15 of the *Civil Procedure Rules, 2010*.
14. I have duly considered the entire originating summons, the defendant's statement of defence and the parties' respective submissions. So, the issues for determination are as captured in the case of *Wilson Kazungu Katana and 101 others* (*supra*) 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.

D. Discussion and Determination

15. It must be noted that the plaintiffs' claim is for the whole of land reference numbers West Kasipul/Kasimba/1936 measuring approximately zero decimal one three hectares (0.13 Ha) in area, the suit land herein. Therefore, the plaintiff's claim is over definite portions of land as held in the case of *Muthuita v Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
16. On the issue of registration, the plaintiff stated that the title to the suit land is registered in the name of the defendant. She produced a copy of the green card (JAO 1) which revealed that the defendant is the proprietor of the suit land with effect from 2nd July 2015.
17. Furthermore, the defendant produced a copy of the title deed to the suit land showing that indeed the same is registered in his name and title issued thereto on 7th July 2015. Therefore, the first dictate is resolved accordingly.
18. As regards open and exclusive possession of the suit land, the plaintiff contends that together with her deceased husband, they have been in occupation of the suit land since 2003. That they have fenced the land, constructed a permanent house and pit latrine, planted trees and dug a well thereon. The plaintiff produced a bundle of photographs (JAO 2), showing the developments on the suit land.
19. The defendant conceded that the plaintiff has put up structures on the suit land in the statement of defence dated 3rd August 2020 and duly lodged on even date. He averred that the plaintiff's occupation has not been uninterrupted, as he has lodged various complaints including one at the chief's office-Kokech Location. Nonetheless, the second dictate is resolved since no documentation was availed by the defendant to substantiate that assertion.
20. Further, it is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma and 3 others* (2017) eKLR.
21. Regarding the third dictate, the plaintiff stated that she has been in occupation of the suit land since 2003 to date. That it was not until 2017, that the defendant brought interested buyers to the suit land and threatened to demolish the plaintiff's house. Clearly, that is a period in excess of 12 years. Indeed, the defendant has never filed an eviction notice against the plaintiff.
22. It is the plaintiff's contention that the defendant had opportunity to interrupt the continuous possession of the suit property by the plaintiff. However, he failed to do so.



23. Indeed, the plaintiff has demonstrated that she has been in peaceful and continuous enjoyment and use of the suit land in excess of twelve years. The defendant has been dispossessed thereby; see Halsbury's Laws of England 4th Edition Volume 28.
24. Sections 107 to 109 of the Evidence Act Chapter 80 Laws of Kenya provide that he who alleges must prove; see also Wilson Kazungu Katana case (*supra*).
25. In Kirugi and another v Kabiya and 3 others (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities. The instant suit is not an exclusion thereof.
26. To that end, it is the finding of this court that the plaintiff has proved her claim against the defendant on a balance of probabilities. She is entitled to the orders sought in the originating summons.
27. Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders 1, 2, 3 and 4 sought on the face of the Originating summons and as stated in paragraph 5 (a), (b), (c) and (d) hereinabove.
28. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 17TH DAY OF APRIL 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Defendant, present in person

2. Ochumba, Court Assistant

