



REPUBLIC OF KENYA



Gari & 18 others v Nyambai & 3 others (Environmental and Land Originating Summons 32 of 2020) [2025] KEELC 1416 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 32 OF 2020**

M SILA, J

MARCH 20, 2025

BETWEEN

MONICA GARI 1ST PLAINTIFF
CLEMENT OTIENO GARI 2ND PLAINTIFF
SUSAN ANYANGO ADONGO 3RD PLAINTIFF
GEORGE ONANDA ADONGO 4TH PLAINTIFF
KENNEDY ONYANGO ADONGO 5TH PLAINTIFF
JOSEPHINE ATIENO OKOTH 6TH PLAINTIFF
PHILIP OCHIENG ADONGO 7TH PLAINTIFF
SERFIN MIGANDA 8TH PLAINTIFF
PANCRAS OTIENO MIGANDA 9TH PLAINTIFF
SILAS ODHIAMBO MIGANDA 10TH PLAINTIFF
CHARLES MIGANDA 11TH PLAINTIFF
SAMSON MIGANDA 12TH PLAINTIFF
WILLIAM MIGANDA 13TH PLAINTIFF
ALICE ADHIAMBO OTIENO 14TH PLAINTIFF
ALFRED OTIENO 15TH PLAINTIFF
JOHN OUMA OTIENO 16TH PLAINTIFF
PIUS OLUOCH OTIENO 17TH PLAINTIFF
SAMWEL ODOYO OTIENO 18TH PLAINTIFF
EMMANUEL OCHIENG OTIENO 19TH PLAINTIFF



AND

SABIANO OUMA NYAMBAI 1ST DEFENDANT
SYLVESTER OGARA JOHN OGI 2ND DEFENDANT
RONALD ODEGE NYAMBAI 3RD DEFENDANT
ALGON OCHIENG DURO 4TH DEFENDANT

JUDGMENT

1. The plaintiffs filed this suit through an originating summons dated 7 July 2020 seeking a declaration from this court that they have acquired title, by way of adverse possession, to 14 hectares located in the land parcel LR Suna East Kakrao/666 (hereinafter referred as the suit property or the suit land).
2. In support of their claim, the plaintiffs pleaded that their patriarch, one Remjeus Gari (deceased), jointly with the 1st defendant's grandfather, one Mathayo Ogii Nyambai, in the year 1949, settled on the suit land which in total measures 33 hectares. They averred that the patriarchs took their respective portions and demarcated the boundaries which have been in existence since 1949. It is averred that their patriarch, Remjeus Gari, had three sons, namely Daniel Adongo, Alloyce Miganda, and Clement Otieno Gari, who sired numerous children, all of whom settled on the claimed 14 hectares. They contended that their occupation, possession and use of the said portion of the suit land has been adverse to the proprietary rights of the defendants and of the estates of Mathayo Ogii Nyambai (deceased) and Siprianus Nyambai Ogii (son of Mathayo Ogii, also now deceased).
3. They contended that 1st and 4th defendants illegally became registered as joint owners of the suit land on 23 July 2014 before the filing and conclusion of Succession Cause No. 38 of 2016, in the matter of the Estate of Siprianus Nyambai Ogii (deceased) and therefore the subsequent transfer of titles to the suit land to the 2nd, 3rd and 4th defendants is anchored on illegality.
4. In response, the respondents filed a replying affidavit sworn by Sabiano Ouma Nyambai the 1st respondent. He deposed inter alia that Ogii Nyambai (Ogii) and Remjeus Gari (Remjeus) were not related. That Remjeus came from Siaya and sought refuge in the home of Ogii. After a short stay in his homestead, he was given one acre to stay on and cultivate while he prepared to continue with his journey. He averred that later Remjeus brought his family from Siaya and fenced this one acre. He averred that he lived on it until his death in 1992 and this is where he was buried. He deposed that the 2nd applicant and the other sons of Remjeus built their houses (simba) within the one acre and they lived here until 2004 when the first son, Daniel Adongo Gari (deceased), moved from the one acre and built a home on the land. He continued to depose that in 2006, another son of Remjeus, Alfred Juma (deceased), also moved out of the one acre and constructed a home on the suit land. In 2011, Clement Otieno Gari did the same. He deposed that a suit being Migori Civil Case No. 94 of 2011 was filed. He averred that after the death of his father (Siprianus) he filed succession case No. 38 of 2016 and obtained a grant. The plaintiffs subsequently applied for its revocation which the lower court allowed but he successfully challenged this on appeal before the High Court. He contended that contrary to the allegation that the applicants possessed 14 ha, they only occupied one acre of land and that it is on this one acre where Remjeus and his descendants had their homes. He refuted that the plaintiffs are entitled to 14 ha as they claim.



5. The matter commenced hearing on 1st November, 2023. Clement Otieno Gari testified on his own behalf and on behalf of all the plaintiffs. He adopted his averments in his supporting affidavit dated 7th July, 2020 as his evidence in chief which I have already elaborated above. He also produced various documents as exhibits including a surveyor's report. He testified that the suit land was registered in name of Ogii in 1973 while they were in occupation and that they have had no issue with the defendants regarding their settlement on the land.
6. Cross-examined, he confirmed that prior to filing this suit there was a judgment entered by the High Court dismissing his claim seeking to have the grant issued to the 1st defendant revoked. He reiterated that his late father entered the suit property in 1949 before adjudication. He conceded that during adjudication the suit property was registered in the name of Ogii Nyambai. He stated that his father contested the said registration but the title remained in the name of Ogii Nyambai. Ogii Nyambai died before his father. He recalled that the 1st defendant had sued them for trespass. He yielded that he has never carried out succession of his father and that all he filed was an objection against succession in the estate of Siprianus Nyambai. He reiterated that the plaintiffs' claim is that they have been in occupation of a portion of the suit property measuring 14 hectares for a period of more than 12 years.
7. With the above evidence the plaintiffs closed their case.
8. DW-1 was Sabiano Ouma Nyambai, the 1st defendant. He adopted his statement as his evidence in chief. That statement is more or less an elaboration of what is in the replying affidavit to the Originating Summons which I set out earlier. The statement elaborates that he is the first born son of the late Siprianus Nyambai Ogii (deceased) who was in turn son of Ogii Nyambai. Ogii is therefore his grandfather. He avers in the statement that Remjeus was on his way to Tanzania when he sought refuge at the home of Ogii. He was supposed to stay for a short while and then proceed with his journey after the rains. But this did not happen, and since Ogii was polygamous, he gifted him one acre at the far end of the land to stay, as he decided whether to move or continue with his journey. He stated that Remjeus left for a while and when he came back he came with his young family and settled on the one acre gifted to him. They stayed this way and during adjudication and that Remjeus acknowledged that he was just a refugee and not the owner of the land. Ogii died in 1987 and he alleged that the family of Remjeus retained the boundary of one acre. Remjeus died in 1992 and he stated that his family continued occupying the one acre until 2004 when Daniel (his first born son) moved from the one acre at the far end and constructed a home in the centre of the suit land. He averred that this shocked the family and his father, Siprianus, sought advice from the area Chief who told him to file succession as the title was still in name of his father (Ogii). Siprianus then filed the suit Migori Succession Cause No. 710 of 2004 and was issued with a confirmed grant on 31 August 2005. He stated that in 2006, Alloys (the second born son of Remjeus) also moved out of the one acre and this opened the door for the third born, Clement, to do likewise in 2011. He stated that Siprianus was ailing and donated to him a power of attorney which he used to file the suit Migori CMCC No. 94 of 2011. This prompted the plaintiffs to file a Miscellaneous Succession Application No. 85 of 2012 to revoke the grant issued to Siprianus. After Siprianus died, he filed the Succession Cause No. 38 of 2016 and got a grant on 29 July 2016 which was confirmed on 10 November 2017. The plaintiffs filed summons for revocation of grant which was initially allowed but reversed on appeal.
9. Cross-examined he stated that the suit property is currently registered in the name of his late father Siprianus Nyambai and that he is administrator of his estate. He agreed that a surveyor had visited the land but denied that he found a distinct boundary between the occupancy of the family of Ogii and the family of Remjeus. He did not dispute that the family of Remjeus occupy 14 ha and agreed that the plaintiffs are descendants of Remjeus. He conceded that they live here and yielded that the photographs displayed by the plaintiffs depict their homes. Regarding the succession matter, he stated



- that the plaintiffs lost given that the court held that they could not seek the land through succession as they were not part of the family of Ogi. He now stated that Ogi died in 1980. He claimed that his father Siprianus filed the suit No. 94 of 2012 against the plaintiffs. Challenged to produce documents to prove this, he stated that the documents are at home and he did not have them in court. He testified that he was born in 1978. He never witnessed any fight over the land.
10. DW – 2 was Ronald Odege Nyambayi. He is a grandson of Ogi. He adopted a statement as his evidence. It is more or less in similar lines to the claim that the late Remjeus came to the land in 1949 and was gifted one acre. Cross-examined, he appreciated that the late Remjeus Gari settled on the suit land in 1949 which is over 70 years ago. He confirmed too that the late Remjeus Gari died and was buried on the suit land. He had wives who died and were buried on the suit land. He confirmed that the family of Remjeus has grown and his descendants are settled on the suit land. They are now a big population. They undertake ordinary activities on the land such as growing crops, harvesting and generally using the land. He conceded that the family of Remjeus occupies more than one acre. They have never had any altercation on the land.
 11. DW-3 was an elderly man by the name Samson Orwa Ochiel. He stated that the late Ogi and Remjeus Gari were persons who were well known to him since they were his village mates. He testified that Ogi was first to settle on the suit land. He came here in 1948. Later in 1949, Remjeus came to the land. He settled on one acre. He testified that after Remjeus died, his elder son constructed a home outside the one acre. Cross-examined, he acknowledged that if anyone visited the land he would see that the plaintiffs occupy more than one acre. He has never heard of any fighting over the land and their occupation has been peaceful.
 12. With the above evidence, the defendants closed their case.
 13. I invited counsel to file submissions and I have taken note of the submissions filed by counsel for the plaintiffs and defendants. I have taken the same into account before arriving at my decision. My disposition will be pretty brief because I am of opinion that the facts of the case are glaringly in favour of the plaintiffs.
 14. This is a case for adverse possession and it is trite that one needs to demonstrate continuous, uninterrupted, open, and peaceful possession for a duration of at least 12 years. In his submissions, counsel for the defendants submitted that the occupation of the plaintiffs was not peaceful as there was a case for trespass, i.e the case Migori Civil Case No. 94 of 2011. I cannot take this submission seriously as the pleadings for the case were never presented. This court cannot therefore tell what sort of case this was or its outcome. There is of course the other argument that the family of Remjeus was only in occupation of one acre until 2004 when his son Daniel moved out and constructed a house outside the one acre, then followed by his other brother in 2006, and the last son in 2011. I am afraid that there is nothing tangible before me that supports these allegations.
 15. It cannot be contested that the plaintiffs certainly occupy 14 Ha of the suit land. This is clearly discernible from the survey report that was produced as an exhibit. The report was prepared on 9 November 2018 and it shows that there is a distinct boundary dividing the land into two portions and that the plaintiffs occupy 14 Ha. I am not persuaded that they only occupied one acre up to the year 2004 as claimed by the defendants. You would expect that there be an instant suit in 2004 if this was the position. I am fully persuaded that from the time Remjeus settled on the suit land, he occupied the 14 Ha that the plaintiffs now claim. There is no evidence adduced of any boundaries for only one acre, and as I have pointed out, the expert evidence given is that there is a distinct boundary demarcating the 14 Ha which is occupied by the plaintiffs.



16. My own hypothesis is that the defendants wish to have more land, given that their families have grown, and would be more than happy to have the plaintiffs no longer on the suit land. I am afraid to tell them that given that the plaintiffs and their predecessors have been on the land since 1949, which is now more than 70 years ago, their title to this portion of 14 Ha has been extinguished.
17. I therefore enter judgment for the plaintiffs for this portion of 14 Ha that they claim in this suit. I order the registered proprietors to forthwith carve out this area of 14 Ha and cause it to be registered in name of two persons to be nominated by the plaintiffs within the next 7 days, who will hold the land in trust for the other plaintiffs and descendants of Remjeus Gari. In default, the Deputy Registrar or any person authorized by her to proceed and prepare all documents required to have the said 14 Ha in the name of the two nominees of the plaintiffs. I will also order that the defendants and/or anyone claiming under them be permanently restrained from interfering with the quiet possession of the plaintiffs of this 14 Ha portion.
18. The last issue is costs. They will follow the event. Costs of the suit are awarded to the plaintiffs jointly and/or severally against the defendants.
19. Judgment accordingly.

DATED AND DELIVERED THIS 20 DAY OF MARCH 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MIGORI

Delivered in the presence of :

Mr. Omonde Kisera for the plaintiffs

Mr. Oseno for the defendants

Court Assistant – Michael Oyuko

