



**Tenye (Suing on Behalf of the Estate of Didacus Tenye Kagose) v Oginga & another
(Environment & Land Case 5 of 2021) [2023] KEELC 17612 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 5 OF 2021
GMA ONGONDO, J
MAY 30, 2023**

BETWEEN

**DENISH ALEGO TENYE (SUING ON BEHALF OF THE ESTATE OF DIDACUS
TENYE KAGOSE) PLAINTIFF**

AND

JOSEPH OLANG'O OGINGA 1ST DEFENDANT

COLLINS OKINYI OYOO 2ND DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Kanyada/Kanyabala/2633 now subdivided to create land reference number Kanyada/Kanyabala/3100 measuring approximately zero decimal zero four hectares (0.04 Ha) in area and land reference number Kanyada/Kanyabala/2853. The same is located within Homa Bay County.
2. The plaintiff is represented by the firm of Abisai and Company Advocates.
3. The defendants are represented by the firm of Robert Ochieng Advocates.
4. Initially, the suit was lodged at Migori Environment and Land Court before it was transferred to this court, upon its establishment, for hearing and determination in the spirit of Articles 6 (3), 48 and 159 (2) (b) and (e) of the Constitution of Kenya, 2010. The suit proceeded by way of viva voce evidence, pursuant to the orders of the court issued on October 18, 2021.

B. Summary Of The Parties' Respective Cases

5. On September 16, 2019, the plaintiff, through his Advocates, filed the present suit by way of an Originating Summons dated September 5, 2019. The same was brought pursuant to Article 60 (1)(a)



of the Constitution of Kenya, 2010, Order 37 Rules 7(1) and (2) and Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 7 and 38 of the Limitations of Actions Act Chapter 22 Laws of Kenya seeking the orders infra:

- a. That this honourable court do declare the plaintiff to have acquired by adverse possession part of the suit land now subdivided to create land reference number Kanyada/Kanyabala/3100 measuring approximately zero decimal zero four hectares (0.04 Ha) and land reference number Kanyada/Kanyabala/2853.
 - b. That this honourable court be pleased to further order for excision of the portion measuring approximately 0.04 Ha of the land pleaded to from the suit land now subdivided to create land reference number Kanyada/Kanyabala/3100 in which the plaintiff's portion lies and the same be transferred to the plaintiff.
 - c. That this honourable court be pleased to issue an injunction restraining the defendants from interfering with the plaintiff's enjoyment of the said portion of the suit land herein.
 - d. That this court do order that the defendants pay costs of this application.
6. The originating summons is anchored on a twenty-two (22) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff's lamentation is that his father, one Didacus Tenye Kagose (deceased 1) purchased the suit land from one Stephen Orifa Oginga (deceased 2) in 1981. That thereafter, deceased 1 took possession of the suit land, fenced it, planted trees thereon and developed the same. That both deceased 1 and 2 died before the suit land could be transferred into the name of deceased 1. That following succession proceedings in the estate of deceased 2, the 1st defendant, being a beneficiary of the said estate, transferred the suit land to himself.
7. That as a result, the plaintiff instituted Land Case No 158 of 2008 at Land Disputes Tribunal-Asego Division, which tribunal determined the case in favour of the plaintiff. That consequently, the plaintiff filed Miscellaneous Civil Application No 29 of 2009 at Homa Bay Law Courts wherein the determination of the Land Dispute Tribunal was adopted as a decree. That in total disregard of the existing decree, the 1st defendant subdivided the suit land into two parcels, to wit, land reference number Kanyada/Kanyabala/3100 and land reference number Kanyada/Kanyabala/2853 measuring approximately zero decimal zero four hectares (0.04 Ha) and zero decimal zero five hectares (0.05 Ha) in area. That the 1st defendant sold and transferred land reference number Kanyada/Kanyabala/3100 to the 2nd defendant herein. That the portion of the suit land under the possession of the plaintiff now falls within and comprises land reference number Kanyada/Kanyabala/3100.
8. The plaintiff avers that he has been in open and continuous occupation of the suit land for a duration exceeding 30 years. That the defendants' interests over the suit land have ceased and the same ought to be transferred and registered in the name of deceased 1.
9. PW1, Denish Alego Tenye, testified on November 8, 2021 and reiterated the averments on his supporting affidavit on record. He clarified that the portion of the suit land which was purchased by deceased 1 from deceased 2 in 1981 measured approximately 50ft by 100ft in area. That deceased 1 fenced of the said portion and erected structures made of iron sheets thereon. That the 1st defendant did not appeal the decision of the Land Dispute Tribunal Case No 158 of 2008. That the said portion is currently registered under the name of the 2nd defendant. He averred that he has never been chased away or disposed of the suit land. During cross-examination, PW1 admitted that he had no evidence that deceased 1 developed the suit land as per PExhibit 3 and that he has never lived on the disputed portion of the suit land, to wit, land reference number Kanyada/Kanyabala/3100.



10. In his testimony, PW1 relied on a limited grant of letters of administration ad litem of the estate of Didacus Tenye Kagose, sale agreement, bundle of photographs, a copy of the proceedings in Land Dispute Tribunal Case No 158 of 2008, decree in Homa Bay Misc Civil Application No 29 of 2009, a copy of the green card, Land Control Board consent and a certificate of official search (which were produced as PExhibits 1 to 8 respectively).
11. The defendants opposed the claim vide their replying affidavits sworn on November 12, 2019. The 1st defendant deposed, inter alia, that he is the uncle of the 2nd defendant. That his late father Paulo Oginga Oyoo (deceased 3) was the original proprietor of land parcel number Kanyada/Kanyabala/1377 which gave rise to all the parcels of land in question in the instant suit. That deceased 2 who allegedly sold the suit land to deceased 1 lacked capacity to do so, since succession proceedings in the estate of deceased 3 who died in the year 1975, had not been done. He averred that neither deceased 1 nor the plaintiff has ever been in occupation of the suit land. Also, he stated that the plaintiff did not have locus to institute Land Tribunal Land Case No 158 of 2008 as he had not obtained letters of administration in the estate of deceased 1. That therefore, the same is a nullity as is the resultant decree in Homa Bay Misc Application No 29 of 2009.
12. The 2nd defendant stated that the disputed portion of the suit land was the original site of the home of his grandfather, deceased 3. That his relatives are buried thereon. He asserted that he was born and raised on the suit land, thereby denying the plaintiff's averment that deceased 1 took possession of the suit land in 1981. He further stated that the developments on the disputed portion were done by his late father and not deceased 1.
13. DW1, Collins Okinyi Oyoo, testified on June 15, 2022 and adopted his Replying Affidavit sworn on November 12, 2019 as part of his evidence. He relied on a list of documents of even date, serial numbers 1 to 7, to wit, chief's introductory letter dated November 18, 2019, adjudication record for land parcel no Kanyada/Kayabala/1377 of Serial No 694006, mutation form for land parcel no Kanyada/ Kayabala/1377 dated March 1, 1993, green card for land parcel no. Kanyada/ Kayabala/2633, land search for land parcel no Kanyada/Kayabala/3100, title deed for land parcel no Kanyada/Kayabala/3100 and National Identification card of Collins Okinyi, which were admitted as DExhibit 1 to 7 respectively.
14. During cross-examination, DW1 stated that he had not been born by 1981 when deceased 1 and 2 allegedly entered into the contract for sale of the suit land.
15. Learned counsel for the plaintiff filed submissions dated October 11, 2022 on October 12, 2022. Counsel identified six issues for determination, to wit, whether or not the subject matter herein is LR No Kanyada/Kanyabala/3100 being a subdivision of the suit land; whether or not the deceased took occupation of the suit land and controlled it for more than 12 years uninterrupted; whether the plaintiff herein took over the control of the suit land since the demise of deceased 1 from 2003 for a period of over 12 years; whether or not the occupation by both deceased 1 and the plaintiff was peaceful, uninterrupted and with knowledge of the defendants; whether or not the plaintiff has proved his case on a balance of probabilities and merits the orders sought and who should bear the costs of this case. Counsel relied on various authorities including the case of *Joseph Kithinji M'Eringo & another -vs- Christine N Mbiti (2021) eKLR* and *Jaber Mohsen Ali & another -vs- Priscillah Boit & another (2014) eKLR*, to fortify his submissions.
16. Learned counsel for the defendants filed submissions dated November 9, 2022 on November 14, 2022, urging the court to dismiss the plaintiff's claim with costs. Counsel submitted that having obtained a decree in Homa Bay Miscellaneous Application No 29 of 2009, it would be more prudent to execute the said decree instead of seeking the orders sought in the instant suit. Counsel relied on the case of



Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another (2015) eKLR, to buttress his submissions.

C. Issues For Determination

17. 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-vs-Falcon Grounds Ltd (2000) 2 EA 385*.
18. I have duly considered the entire originating summons, the testimony of PW1 and the plaintiffs' submissions as well as the testimony of DW1 and the defendants' submissions. So, the issues for determination are as captured in the case of *Wilson Kazungu Katana (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

19. It must be noted that the plaintiff's claim is for land reference number Kanyada/Kanyabala/3100 measuring approximately zero decimal zero four hectares (0.04 Ha) in area. The said title resulted from the subdivision of land reference number Kanyada/Kanyabala/2633, the suit land herein. Therefore, the plaintiff's claim is over definite portions of land; see *Muthuita -vs- Wanoe & 2 others (2008) 1KLR (G&F) 1024*.
20. On the issue of registration, PW1 stated that the suit land is registered in the name of the 2nd defendant. He produced in evidence, a copy of certificate of official search for the disputed portion of the suit land dated August 26, 2019 which revealed that the 2nd defendant is the proprietor of land reference number Kanyada/Kanyabala/3100 with effect from January 17, 2018 (PExhibit 8).
21. Similarly, the 2nd defendant produced in evidence a certificate of search for land parcel no Kanyada/Kayabala/3100 and a copy of the title deed for land parcel no Kanyada/Kayabala/3100. Both documents indicate that the 2nd defendant is the registered proprietor of the said parcel.
22. As regards open and exclusive possession of the suit parcels of land, PW1 testified that his father, deceased 1, took possession of the suit land in 1981 until his demise in 2003. That thereafter, the plaintiff took possession of the same until 2019.
23. On the other hand, the defendants' counsel submitted that the plaintiff has not adduced sufficient evidence to prove the same.
24. I note from the proceedings of the Land Dispute Tribunal Case No 158 of 2008 of March 17, 2009 that the 1st defendant herein admitted that indeed, deceased 1 purchased the suit land from deceased 2. He further stated that deceased 1 put up the structures on the disputed portion and built trees thereon. He admitted that the land was registered in his name but agreed that he would transfer the same to the plaintiff herein, once both parties agreed.
25. Evidently, and as noted by the defendants' counsel, the plaintiff herein lacked locus to institute the case before the tribunal as he had not obtained letters of administration to the estate of deceased 1 at the



time. Further, deceased 2 had no capacity to enter into a sale agreement with deceased 1 as he was not the proprietor of the suit land. Nevertheless, the 1st defendant herein admitted that deceased 1 took possession of the disputed portion and built structures thereon. It is also important to note that the plaintiff has since obtained limited grant of letters of administration ad litem to the estate of deceased 1. The same was issued on October 18, 2018.

26. It is settled law that possession can take different forms such as cultivation; see [Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others \(2017\) eKLR](#).
27. Regarding the third dictate, PW1 stated that his father, deceased 1, took possession of the suit land in 1981 until his demise in 2003. Thereafter, the plaintiff continued in possession of the same until 2019.
28. The defendants' counsel submitted that since the claim has been brought on behalf of the estate of deceased 1, time stopped running in June 2003 upon the demise of deceased 1.
29. Clearly, no sufficient evidence was adduced to controvert the plaintiff's assertion that deceased 1 entered upon the suit land in 1981. That is a period in excess of 12 years. Indeed, the defendants have never filed an eviction notice against the plaintiff over the suit land.
30. It is my considered view that the plaintiff has demonstrated that deceased 1 had been in peaceful and continuous enjoyment and use of land reference number Kanyada/Kanyabala/3100 in excess of twelve years. The defendants have been dispossessed thereby; see [Halsbury's Laws of England 4th Edition Volume 28](#).
31. Section 107 of the [Evidence Act](#) Chapter 80 Laws of Kenya provides that he who alleges must prove; see also Wilson Kazungu Katana case (supra).
32. In [Kirugi and another-vs-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.
33. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendants on a balance of probabilities. The defence hereby fails. Therefore, the plaintiff is entitled to the orders sought in the originating summons.
34. 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.
35. It is so ordered.

DELIVERED, SIGNED AND SIGNED AT HOMA BAY THIS 30TH DAY OF MAY 2023.

G.M.A ONG'ONDO

JUDGE

Present

Mr. J. Kisera, holding brief for Mr. Abisai, learned counsel for the plaintiff

Ms. Adingo, holding brief for R. Ochieng', learned counsel for the defendants

Okello, Court Assistant

