



REPUBLIC OF KENYA



KENYA LAW
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Onyuka v Nyaboke (Appeal 10 of 2022) [2023] KEELC 17584 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17584 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
APPEAL 10 OF 2022
GMA ONGONDO, J
MAY 29, 2023
(FORMERLY MIGORI ELC APPEAL NO. E038 OF 2021)

BETWEEN

FREDRICK OMONDI ONYUKA APPELLANT

AND

JANE NYABOKE RESPONDENT

RULING

1. By a memorandum of appeal dated August 18, 2022, the appellant through G S Okoth and Company Advocates initiated this appeal premised on grounds *inter alia*:
 - i. The learned trial magistrate misdirected himself on several matters of law and facts in that having been satisfied that the defendant has been in occupation of the suit land for over 25 years which suit land is registered in the name of the plaintiff what should have come to the court's mind should have been Section 28 of the [Land Registration Act](#) dealing with overriding interest.
 - ii. The learned trial magistrate erred in law of evidence in deciding the case against the weight of evidence in that;
 - a. Evidence adduced showed that the appellant had been in occupation of the suit land for over 25 years before the instant suit was filed.
 - b. The court ignored the fact that the former registered proprietor Jackton Ocharo, the husband to the respondent who was barred by Section 7 of [Limitation of Actions Act](#) in order to defeat justice transferred the suit land to his wife and further fronted the respondent to institute a suit against the appellant, which claim should have been struck out for being an abuse of the court process.



- c. The court ignored the evidence adduced by the appellant that the respondent was only entitled to 4 acres of the land sold to her husband by Onyuka Akado and further ignored the discrepancies in the land sale agreement showing that the suit measures 20 acres whereas the evidence adduced in court by the plaintiff shows that land measures only 17 acres.
 - d. The court failed to consider the principle of overriding interest and acquisition of title by adverse possession as provided in Section 28 of the [Land Registration Act](#).
- iii. The learned trial magistrate erred in law in issuing an eviction order against the appellant when it was evident that he had acquired title to the portion he occupies which was said to be 13.79 acres excluding the 4 acres sold to the respondent's husband which has remained unoccupied and was in his possession for all the time material to this suit.
 - iv. The learned trial magistrate erred in matters of fact in failing to note that the photographs of the suit land presented as evidence by the appellant was properly consonant to the evidence adduced by the parties and other witnesses.
 - v. The learned trial magistrate erred in law of practice and procedure in failing to note that the dispute relating to the suit land was initiated by the original proprietor of the suit land challenging acquisition of the same by the respondent's husband as early as 1993 by filing civil suit no 413 of 1993 which suit has a glaring significance to the instant suit as the same challenges transfer and registration of the instant title.
2. On April 12, 2023, the appellant filed a notice of withdrawal of the appeal in entirety with no orders as to costs since the parties herein have settled the decree of the original trial court.
 3. Furthermore, Ms Okello instructed by G S Okoth and Company Advocates has informed this court that the parties have settled the matter.
 4. In the foregone, I find the application for withdrawal of this appeal meritorious.
 5. Wherefore, this appeal be and is hereby marked as withdrawn with no orders as to costs.
 6. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MAY 2023.

G.M.A ONG'ONDO

JUDGE

Present

Ms. Okello holding brief for G. S. Okoth, learned counsel for the appellant

Okello and Mutiva, Court Assistants

