



**Obong'o v Onyango (Environment & Land Case 38 of 2021)
[2023] KEELC 17514 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 38 OF 2021
GMA ONGONDO, J
MAY 24, 2023
FORMERLY MIGORI ELCC OS NO. 21 OF 2020**

BETWEEN

DR GEORGE HAZARIAH OBONG'O PLAINTIFF

AND

BENJAMIN OLIECH ONYANGO DEFENDANT

JUDGMENT

1. The instant suit revolves around the following two parcels of land;
 - a. Land Reference number Central Karachuonyo/Konyango/1532 (The suit land herein)
 - b. Land Reference number Central Karachuonyo/Konyango/ 2605 measuring approximately Zero Decimal Two Zero hectares (0.20 Ha) in area (The plaintiff's land herein) which is a sub division of land reference number Central Karachuonyo/Konyango/1190 measuring approximately Zero Decimal Two Nine hectares (0.29 Ha) in area.
2. Pursuant to Order 37 Rule 19 of the Civil Procedure Rules, 2010, on 21st June 2022, the court directed, inter alia;

“The Originating summons dated 25th May 2020 and filed on 27th May 2020 and statement of defence and counter claim dated 10th June 2020 and filed be treated as complaint and counterclaim respectively,

The defendant counsel may file and serve any other pleadings including Replying affidavit and parties may file and serve any other documents within the next 30 days from this date. Hearing by way of viva voce evidence”



3. The plaintiff through the firm of G.S Okoth and Company Advocates, commenced the suit by way of an originating summons dated 26th May 2020 and lodged in court on 27th May 2020, claiming to have acquired the suit land by adverse possession and prays for determination of the questions thus;
 - a. Whether the building erected by the plaintiff in 1991 or thereabout fall within the land measuring 70 paces by 43 paces by 50 paces measured by the defendant personally and purchased by the plaintiff in 1989.
 - b. Whether the buildings are erected within the suit land as determined by the Survey Report dated 23rd August 2016? And if so, which buildings are within Parcel No. 1532 above mention?
 - c. Whether the defendant ever asserted his title rights, and interest over the suit land by 2004 or thereabout which is about 12 years from the date the plaintiff occupied the land and erected the said buildings?
 - d. Whether the plaintiff has acquired title to the suit land by adverse possession or not?
 - e. Whether the acts of depositing stones and other building materials at the doors of the said buildings and shops and closing entrances to the same would amount to acts of trespass, especially where the plaintiff acquired title to the same by adverse possession?
 - f. Whether the said occupation of the portion of the suit land has been open, notorious, peaceful, continuous, uninterrupted for a period of more than 12 years or not?
 - g. Who is to bear the costs of this suit.
4. The originating summons is premised upon an affidavit of twenty-two paragraphs sworn on the even date by the plaintiff and the annexed documents marked as “GHO-1” to “GHO-7” which include; sale of land agreement, photographs, mutation and judgment. In summary, the plaintiff’s lamentation is that in 1991 or thereabout, he erected commercial buildings on the land with the assistance of the defendant who is claiming that some of the buildings are on the suit land. That therefore, the plaintiff has acquired title to the portion where the buildings stand by adverse possession and that the same be surveyed and merged with the plaintiff’s land.
5. By a statement of defence and counter claim dated 10th June 2020, the defendant through the firm of Mimba and Company Advocates, denied the plaintiff’s claim and sought eviction of the plaintiff from the suit land respectively. He stated in part that the court has already determined in his favour that the plaintiff has trespassed into the suit land belonging to the defendant.
6. Further, in the defendant’s replying affidavit sworn on 24th June 2022, he deposed, inter alia, that the suit has no chance of success. That the same is based on falsehood and meant to mislead the court. That the plaintiff’s civil case number 96 of 2016 at Oyugis Principal Magistrate’s Court was dismissed in his favour. That Land case appeal No. 1 of 2019 at Migori Environment and Land Court from the said decision was dismissed, too. He has sought an eviction order against the plaintiff in respect of the suit land.
7. In a reply to statement of defence and defence to counter claim dated 5th March 2021, the plaintiff termed the defendant’s actions of building on part of the suit land actionable trespass. That the defendant ought to have filed a replying affidavit and not a statement of defence. That judgment be entered in favour of the plaintiff and that the defence as well as the counter claim be dismissed with costs.



8. In his evidence, the plaintiff (PW1) relied on his statement, supporting affidavit and a List of plaintiff's documents dated 20th July 2020 S/Nos. 1 to 10 (PExhibits 1 to 10 respectively) and a supplementary list of documents dated 5th March 2021 (PExhibit 11). He stated in part that he erected a permanent building on the portion of the suit land.
9. PW2, was Harrison Owuor Akeyo who testified, inter alia, that he is a son of James Akeyo Awuor who sold a portion of the suit land to PW1 in 1990. He relied on his statement dated 4th August 2020 as part of his evidence.
10. According to Gordon Odingo Nyaguti (PW3) who relied on his statement dated 4th August 2020 as part of his evidence, he built a house for PW1 in 1990. That he erected the same on the suit land.
11. The defendant (DW1) relied on his statement dated 10th June 2020, replying affidavit and statement of defence as part of his evidence. Also, he relied on his list of documents dated 10th June 2020 S/No. 1 to 5 (DEXhibits 1 to 5 respectively).
12. In the plaintiff's submissions dated 16th November 2022, reference was made to parties' respective pleadings, facts and evidence of the case as well as delineated four issues for determination including whether the suit is re judicata Oyugis Case number 96 of 2016. In discussing the issues in favour of the plaintiff's claim, learned counsel for the plaintiff cited *Halsbury's Laws of England*, 4th Edition (Reissue) Volume 28 at paragraph 977 on the meaning and effect of adverse possession as well as *Njuguna Ndatbo-vs-Masai Itumo & 2 others* (2002) eKLR, among other authorities.
13. By the submissions dated 27th October 2022, learned counsel for the defendant stated-

“..... The Applicant, your Honour even confirmed he had filed several cases in court claiming the respondent had trespassed on his land which suits were dismissed.
14. I have duly considered the parties' respective pleadings, evidence and submissions in entirety. So, the following issues fall for determination;
 - a. Is this suit barred by Res judicata principle?
 - b. Subject to issue (a) hereinabove, has the plaintiff established his adverse possession claim over the suit land against the defendant to the requisite standards?
15. As regards the first issue, paragraph 13 of the plaintiff's supporting affidavit reads;

“That on the 6th June 2016, I filed a suit against the defendant challenging the said act as being an act of trespass but the court dismissed my suit and an appeal against the said decision was also dismissed (vide copies of judgements annexed and marked 'GHO=6A' and "6B"
16. The documents annexed to the said affidavit and marked as "GHO-6A and GHO-6B are judgments in Oyugis Principal Magistrate's Court Civil Case No. 96 of 2016 and in Migori ELC Appeal No. 1 of 2019 delivered on 19th December 2018 and 20th May 2020 respectively.
17. The defendant (DW1) relied on his statement dated 10th June 2020 as part of his testimony. He stated, inter alia, that the plaintiff filed Oyugis Principal Magistrate's Court Civil Case No. 96 of 2016 and stopped him from preparing the suit land. That however, the said case was dismissed in his favour.
18. Again, in his replying affidavit sworn on 24th June 2022, DW1 deposed in paragraphs 6 and 7 that PW1 sued him in Oyugis Principal Magistrate's Court Civil case number 96 of 2016 but the suit was



- dismissed. That Migori Environment and Land appeal number 1 of 2019 that arose from the said suit, affirmed the trial court's judgment.
19. In his testimony, DW1 relied on his list of documents dated 10th June 2020. They include; proceedings and/or judgment in respect to Oyugis Principal Magistrate's Court Civil case number 96 of 2016 and Migori ELC Appeal number 1 of 2020 (DExhibit 5).
 20. It must be borne in mind that the said suit and the appeal involved the plaintiff and the defendant over the same suit land and the plaintiff's land. Both matters were determined on merits. On that account, this suit is barred by Res Judicata principle under section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
 21. In *Black's Law Dictionary* 10th Edition at page 1504 the term "Res Judicata" means an issue that has been definitively settled by judicial decision and it's three essential elements are thus;
 - a. An earlier decision on the issue,
 - b. A final judgment on merits, and
 - c. The involvement of the same parties or parties in privity with the original parties.
 22. Further, the key elements that would give rise to res judicata were well identified; see *Uburu Highway Development Ltd-vs-Central Bank of Kenya* (1999) eKLR.
 23. On the second issue, this court is guided by the decision in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another* (2015) eKLR on adverse possession dictates, inter alia, that the suit land must be registered in the name of a person other than the applicant in the matter in question.
 24. It is established law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
 25. Be that as it may, as noted in paragraphs 16 to 23 hereinabove, res judicata principle is applicable to this suit.
 26. Moreover, I echo the decision in the case of *Eunice Wangui Muturi-vs-Francis Kamunde and another* where Obaga J observed;

“.....Public policy demands that litigation has to come to an end.....”
 27. The cardinal principle is that litigation has to come to an end; see *Halsbury's Laws of England* (4TH Edition) Volume 22 page 273.
 28. To that end, the plaintiff is not entitled to the orders sought in the originating summons.
 29. A fortiori, this suit is devoid of merit and the same is hereby dismissed with costs to the defendant.
 30. As regards eviction sought in the Replying Affidavit and statement of defence and in consonant with section 152 A of the *Land Act*, 2016 (2012), the plaintiff shall remove his house from the portion of the suit land and hand over vacant possession of the portion to the defendant within the next seventy-five (75) days from this date failing which eviction order to issue against the plaintiff; See also *Mohammed Mubidin (suing for and on behalf of the estate of Mohammed Mubidin Mohammed Hatimy) -versus-Jackson Muthamae and 166 others* (2014) eKLR.
 31. It is so ordered.



DATED AND DELIVERED AT HOMABAY THIS 24TH DAY OF MAY 2023

G. M. A ONG'ONDO

JUDGE

Present

M.s Mimba, learned counsel for the defendant.

Ms. P.Odhiambo learned counsel instructed by G.S Okoth for

