



**Mambah & another v Kariuki (Sued as Legal Representative of Erastus Kariuki Apollo - Deceased) & 2 others (Environment & Land Case 43 of 2021) [2023] KEELC 18462 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 43 OF 2021  
GMA ONGONDO, J  
JUNE 20, 2023**

**BETWEEN**

**RAPHAEL OBUDHO MAMBAH ..... 1<sup>ST</sup> PLAINTIFF**

**PETER OTIENO OBALA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN KAMAU KARIUKI (SUED AS LEGAL REPRESENTATIVE OF ERASTUS KARIUKI APOLLO - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**NICHOLAS OWAKA OTIENO ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, HOMA BAY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

A. Introduction

- 1) The instant dispute revolves around land reference number Kanyamwa/Kabonyo/Kwandiku/206 measuring approximately four decimal five hectares (4.5 Ha) in area (The suit land herein). The same is contained in Registry Map Sheet number 19 and located within Homa Bay County.
- 2) The suit land is registered in the name of the 2<sup>nd</sup> defendant (DW5) with effect from 15<sup>th</sup> May 2018. Notably, it was registered in the name of Erastus Kariuki Apollo (Deceased-1 herein) as at 14<sup>th</sup> August 1992.
- 3) The plaintiffs are represented by the firm of G.S Okoth and Company Advocates while the defendant is represented by the firm of Veronica Migai and Company Advocates.



- 4) Originally, the present suit was lodged at Migori Environment and Land Court. On 21<sup>st</sup> September 2021, it was transferred to this court for hearing and determination. Therefore, the same was heard by of viva voce evidence pursuant to this court's directions of 28<sup>th</sup> February 2022.
- 5) By dint of a notice of motion application dated 31<sup>st</sup> May 2018, the 3<sup>rd</sup> defendant's memorandum of appearance dated 19<sup>th</sup> September 2018 duly filed on 26<sup>th</sup> September 2018 and the proceedings of 28<sup>th</sup> February 2022 herein, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants joined this suit. Indeed, the said application was determined by consent of the parties on 31<sup>st</sup> July 2018.

## **B. The Plaintiffs' Case**

- 6) The plaintiffs commenced the suit by way of an originating summons dated 16<sup>th</sup> May 2018 and lodged in court on even date and supported by the 1<sup>st</sup> plaintiff's affidavit of eleven paragraphs sworn on even date and the annexed documents marked as 'ROM-1A to ROM-6' which include; a certificate of official search and a map. They claim to be beneficial owners and occupiers of the whole of the suit land for determination of the following questions;
  - a) Whether land parcel number Kanyamwa/Kabonyo/Kwandiku/206 now registered in the name of Erastus Kariuki Apollo (Deceased 1) is part of family land of Patrick Mamba Aliwa (Deceased 2) and Patrick Okola Okojo (Deceased 3) or not and if so, did the land owners enter into any contractual relationship with Deceased-1?
  - b) Whether the registration of the name of Deceased-1 was made fraudulently or not and if so by whom?
  - c) Whether the family and kinsmen of Deceased-2 and Deceased-3 have occupied, possessed or resided on the suit land; and if so for how long have they occupied the same?
  - d) Whether the registered proprietor, Deceased-1 or any of his kinsmen have ever occupied, cultivated or used the suit land in any way?
  - e) Whether the registration of Deceased 1 as proprietor of the suit land was done fraudulently or openly and had he ever since asserted his right of ownership over the said land at all?, and if not, what is the legal effect thereof?
  - f) If the answer to 3 above is positive, whether the said occupation and possession has been peaceful, continuous, uninterrupted and open for a period of more than twelve years or not?
  - g) Whether the estate of Deceased-3 and Deceased-2 or any of the kinsmen occupying the suit land have acquired title to the suit land by way of adverse possession?
  - h) Who is to bear the costs of this suit ?
- 7) Briefly, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' lamentation is that they are sons of Deceased-2 and Deceased-3 respectively. That in the year 1995, the 1<sup>st</sup> plaintiff discovered that the suit land was registered in the name of the defendant's father, Deceased 1. That initially, deceased 2 and deceased 3 owned it alongside Land reference number Kanyamwa/Kabonyo/Kwandiku/207 and had not sold the same to deceased 1. Thus, it precipitated the instant suit.
- 8) By the 1<sup>st</sup> plaintiff's further affidavit sworn on 6<sup>th</sup> July 2018 and filed 10<sup>th</sup> July 2018 in response the to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's replying affidavits sworn on 11<sup>th</sup> January 2018, PW2 deposed, inter alia, that DW1 asserted title after 24 years. He challenged D1 to prove that Deceased-1 purchased the suit



land from Deceased-2 and Deceased-3. He reiterated the contents of his affidavit in support of the originating summons.

- 9) Martin Obilo Aliwa (PW1) testified that as a farmer and resident of Kwandiku sub location in Ndhiwa sub county, Homa Bay, he was aware of the dispute relating to the suit land. That he knew deceased 2 and deceased 3 who were his relatives. He relied upon his statement dated 12<sup>th</sup> February 2021 as part of his testimony.
- 10) PW2 was the 1<sup>st</sup> plaintiff who told the court that he is a son to Deceased 2 who owned the suit land. That in 1995, he discovered that Deceased 1 was the registered proprietor of the suit land yet Deceased 2 had not sold the suit land to any person. As part of his evidence, he relied on the originating summons, his supporting affidavit thereto and the documents marked as 'ROM-1' to "ROM-6" annexed to the affidavit (PE Exhibits 1 to 6).
- 11) PW3 who is the 2<sup>nd</sup> plaintiff herein, testified that he is a son of Deceased 3 and a cousin to PW2. He relied on his statement dated 18<sup>th</sup> August 2018 and stated in part, that he was young when land adjudication was carried out in the area.
- 12) PW4 was John Were, a retired public works officer. He relied on his statement dated 2<sup>nd</sup> December 2021 as part of his evidence in chief. He told the court that he was not present during land adjudication in the area as he used to be away on duty at Kisumu. That the suit land belonged to Deceased 2 and that the plaintiffs are entitled to it.
- 13) By the submissions dated 10<sup>th</sup> March 2023 filed 3<sup>rd</sup> April 2023, learned counsel for the plaintiffs referred to the parties' respective pleadings to the effect that PW2 and PW3 are sons of Deceased-2 and Deceased-3 respectively. That in 1995, PW2 learnt that the suit land was registered in the name of Deceased-1. That the 2<sup>nd</sup> defendant (DW1) asserted that he is a bona fide purchaser of the suit land.
- 14) Counsel delineated six issues for determination, analyzed them and concluded that the plaintiffs have proved their case on a balance of probabilities hence that their claim should be allowed with costs. In support of the submissions, counsel cited, *inter alia*, *Black's Law Dictionary*, 9<sup>th</sup> Edition at page 1355, *Wambugu v Njuguna* [1998] KLR 173 and *Githu v Ndeete* [1984] KLR 776 concerning adverse possession.
- 15) Further, in the plaintiffs' supplementary submissions dated 28<sup>th</sup> April 2023 and filed on 2<sup>nd</sup> May 2023, reference is made to the case of *Munyu Maina-v-Hiram Githiba Maina* [2013] eKLR cited in this court's decision in the case of *Mary Adhiambo Njuguna (suing as the legal representative of the estate of Benard Ayieyo Okoth v Mary Anyango Odeny and another* [2022] eKLR. It was submitted that the plaintiffs never pleaded fraud against the defendants in this suit, among other things.

### C. The Defendants' Case

- 16) In his replying affidavit sworn on 11<sup>th</sup> January 2018, the 1<sup>st</sup> defendant opposed the Originating summons. He deposed, *inter alia*, that deceased 1 lawfully and legally bought the suit land from deceased 2 and deceased 3. That he discovered that PW2 had lodged a restriction over the suit land. That he visited PW2 at his home in Manyuanda in Ndhiwa sub county to discuss the issue of restriction but the latter claimed that a Kikuyu cannot own land in Luo land. That later, DW1 obtained a grant of letters of administration in Ndhiwa Succession Cause No. 24 of 2018 confirmed on 14<sup>th</sup> May 2018 and applied for removal of the restriction in Ndhiwa Misc Application No. 10 of 2018. He relied on his documents including copies of green card and adjudication record and the said application marked as "KK-1a to KK-5" annexed to the affidavit.



- 17) By his replying affidavit of 13 paragraphs sworn on 11<sup>th</sup> January 2018, the 2<sup>nd</sup> defendant opposed the originating summons, too. He deposed in part bought in good faith, the suit land from PW2 who obtained a grant of letters of administration in respect of the estate of Deceased 1 as stated in paragraph 16 hereinabove. That thereafter, the same was registered in his name. That thus, he was a bona fide purchaser of the suit land in 2018 as shown in sale of land agreement and a certificate of official search, among other documents, marked as “NOO-1 2a and 2b” annexed to his affidavit.
- 18) As noted in paragraph 6 hereinabove, the 3<sup>rd</sup> defendant was added to this suit. The Honourable Attorney-General entered appearance for the 3<sup>rd</sup> defendant but neither filed any response to the originating summons nor submissions herein and was duly served as disclosed in, inter alia, an affidavit of service sworn on 10<sup>th</sup> June 2022.
- 19) The defendant (DW1) stated that he is a son of Deceased 1. That deceased 2 sold the suit land to deceased 1. In his evidence, he relied on his statement dated 20<sup>th</sup> January 2022, a list of documents dated 4<sup>th</sup> June 2018 (DExhibits 1 to 4), a list of documents dated 14<sup>th</sup> June 2018 (DExhibits 5 to 9c), a further list of documents dated 24<sup>th</sup> August 2021 (DExhibits 11 to 13) and another list of documents dated 20<sup>th</sup> February 2022 (DExhibits 14 to 17).
- 20) DW2 was George Ogonda Otieno, chief central Kanyamwa Location who relied on his statement dated 24<sup>th</sup> February 2022 as part of his testimony. He stated, inter alia, that he came to learn of the suit land in the year 2016.
- 21) DW3 was John Samuel Opiyo, Assistant chief Upper Kwandiku sub location. As part of his evidence, he relied on his statement dated 24<sup>th</sup> February 2022. He told the court partly that he was not conversant with the suit land.
- 22) DW4, Francis Damason Obonyo Odero relied on his statement dated 24<sup>th</sup> February 2022 as part of his evidence. He testified, inter alia, that PW2 is in use of the suit land.
- 23) DW5 was the 2<sup>nd</sup> defendant and a member of County Assembly, Homa Bay and representing Kanyamwa Ward. He relied on his statement dated 24<sup>th</sup> February 2022 which forms part of his testimony. He stated that he bought the suit land which is registered in his name from DW1 after he viewed it and conducted search thereof. That before the sale, DW1 obtained a grant of letters of administration in respect of the estate of deceased 1 who owned the original proprietor.
- 24) Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed submissions dated 11<sup>th</sup> April 2023 on 20<sup>th</sup> April 2023. Counsel stated the facts of the case in brief and identified twin issues for determination namely whether the plaintiffs have proved allegations of fraud against the defendant and whether they can succeed in their claim for adverse possession. Counsel discussed the issues in the negative and identified the ingredients of adverse possession. To buttress the submissions, counsel referred to Articles 27 and 40 of the *Constitution* of Kenya, 2010 and *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR alongside *Jandu v Kirpal and another* [1975] EA 225 at 232, among other authorities.

#### **D. Issues For Determination.**

- 25) Order 15 of *Civil Procedure Rules*, 2010 provides for framing of issues and materials from which issues may be framed. It is well settled that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court’s determination; see *Galaxy Paints Company Ltd-v-Falcon Guards Ltd* (2000) eKLR.
- 26) I have thoroughly considered the originating summons, the replying affidavits, the further affidavit, the evidence on record and the rival submissions. On that score, the issues for determination are the



questions condensed into triple (3) sets namely; questions (1, 2 and 5) , (3, 4, 6 and 7) and (8) as stated on the face of the originating summons.

### **E. Discussion And Determination**

- 27) Concerning questions 1, 2 and 5, certificates of official search (PExhibits 1 and 6 alongside DExhibit 14) and adjudication record (DExhibit 15) reveal the approximate area of the suit land. Therefore, it is a defined portion of land registered in the name DW5 and as stated in paragraph 1 hereinabove.
- 28) Currently, the registration of the suit land is in the name of DW5 further to sections 24, 25 and 26 of the Land Registration Act, 2016 (2012). PExhibits 1, 6 and 14 show that the same was registered in the name of Deceased 1 as 14<sup>th</sup> August 1992 under sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya (Repealed).
- 29) In the case of Wainaina-v-Murai and others (1976-80) 1 KLR 283 at 289 and 290, Simpson J (As he then was) observed as follows;
- “The land in question is registered under the Registered Land Act.....as the sole proprietor of the piece of parcel of land.....”
- 30) This court is guided by Article 45 (1) of the Constitution (supra) which stipulates;
- “The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state.”
- 31) DW1 testified that Deceased 1 bought the suit land from Deceased 2 and Deceased 3 as per DExhibits 11 and 12. So, the sale of land contract was between it’s original owners and deceased-1 in accordance to section 3 (3) of the Law of Contract Act Chapter 23 Laws of Kenya Revised Edition 2012 bearing in mind the definitions of “sign” and “transfer” under section 3 (6) of the same Act.
- 32) Article 40 (1) of the Constitution (supra) provides;
- “Subject to Article 65 (land holding by non-citizens), every person has the right, either individually or in association with others, to acquire and own property-
- a) of any description, and
- b) In any part of Kenya.....”
- 33) It is must be noted that Deceased 2 and Deceased 3 died in 1977 and 2001 respectively. During their lifetime, they sold the suit land to Deceased 1 and upon completion of adjudication, the same was registered in the name of the latter.
- 34) During cross examination, PW1 could not tell if any objection was raised regarding the suit land during land adjudication. Under cross examination, PW2 stated that the suit land belongs to Deceased-2 but there was no document thereof. That there was an opportunity to raise an objection during land adjudication in respect of the suit land but none was raised at the time.
- 35) The Land Adjudication Act Chapter 284 Laws of Kenya in the preamble reads;
- “An Act of Parliament to provide for ascertainment and recording of rights and interests in Trust Land and for purposes connected therewith and purposes incidental therewith.”



- 36) The said Act displays a detailed procedure for ascertainment and recording of rights and interests of persons in regard to trust land. Once the same is complied with, the ascertainment is final as stated in section 29 of the same Act.
- 37) Clearly, there was no objection raised during the adjudication touching on the suit land. On that strength, the process thereof is deemed to have been exhausted and completed. Thus, the suit land was registered in the name of deceased 1 and DW1 obtained grant of letters of administration in respect of the estate of Deceased 1 as stated in paragraph 16 hereinabove. That DW1 then transferred the suit land to DW5 who is validly registered as proprietor following lawful process of adjudication, sale, transmission and transfer as envisaged in section 26 (1) of Land Registration Act, 2016 [2012].
- 38) On fraud as per questions one and five for determination as stated on the face of the originating summons, the plaintiffs mentioned fraud thereat and in paragraph 15 of the 1<sup>st</sup> plaintiff's supporting affidavit as regards the acquisition of the suit land. In Kinyanjui Kamau case (supra), the Court of Appeal held;
- “ It is trite law that any allegation of fraud must be pleaded and strictly proved in cases where fraud is alleged. It is not enough to infer from the facts.”
- 39) Additionaly, in the case of *R.G Patel-v-Lalji Makani* (1957) EA 314 at 317, the court
- ” Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.....”
- 40) The plaintiffs' counsel confirmed in their submissions that they have not pleaded fraud in the originating summons. Plainly, there are no particulars of the alleged fraud in the plaintiffs' pleadings. Also, the plaintiffs' allegations of fraud have not been distinctly proved in light of the evidence on record herein as noted in Kinyanjui Kamau, Jandu and Patel cases (supra).
- 41) Questions 3, 4, 6 and 7 relate to adverse possession of the suit land in favour of the estate of Deceased 1 and Deceased 2. The plaintiffs claim to have obtained ownership of the suit land by way of adverse possession. The said concept is one of the overriding interests under section 28 of the Land Registration Act, 2016 [2012].
- 42) It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute; see *Kimani Rubine and another v Swift Rutherford Company Ltd and another* [1976-80] 1 KLR 1500 and *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* [2017] eKLR and *Elijah. O.L Opar v Tobias Odhiambo Abach* [2019] eKLR.
- 43) Moreover, I subscribe to the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another* [2015] eKLR where the court cited sections 7 and 13 (1) of the Limitation of Actions Act Chapter 22 Laws of Kenya and set out adverse possession ingredients thus;
- a) The suit land must be registered in the name of a person other than the applicant,
  - b) The applicant must in open and exclusive possession of that suit land in an adverse manner to the title of the owner and
  - c) The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuation of possession by the owner.



27. During cross examination, PW1 could not tell how deceased 2 and deceased 3 used the suit land after the demise of deceased 1. Further, under cross examination, PW3 stated;

“.....I used to live in Nairobi for a long time. I didn’t know who was using the land.....”

44) In cross examination, DW1 told the court that he has the record of sale of the suit land and that deceased 1 used the land. In re-examination, he stated-

“PW2 uses the suit land since the inception of this suit to-date....”

45) During cross examination, DW2 affirmed the testimonies of PW1, PW3 and DW1 that PW2 is in use of the suit land since 2016. Therefore, PW2 has not possessed and occupied the same for a period in excess of 12 years.

46) More importantly, it is noted that DW5 who is the registered proprietor of the suit land has not ceased to possess it for more than 12 years to attract adverse possession in the present matter; see Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 28.

47) DW5 claims to be a bona fide purchaser, a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly and the elements thereof include; the person purchased the property in good faith, for valuable consideration, from a vendor who had apparent valid title and the purchaser had no knowledge of any fraud; see *Katende-v-Haridar & Company Ltd* [2008] 2 EA 173.

48) In the present case, DW5 has proved the legality of his proprietorship of the suit land. That his acquisition of title thereto as per DExhibit 11, 12 and PExhibit 13, among others, was legal, formal and free from any encumbrances as held in *Munyu Maina case* (*supra*).

49) It must be remembered that rights and registrations of land in dispute can be challenged on grounds of fraud and adverse possession; see *Tayebali Adamji Alibhai v Abdulbussein Adamji Alibhai* [1938] 5 EACA 1.

50) In the foregone, the plaintiffs have failed to establish their claim against the defendants to the requisite standards as held in *Wambugu, Githu, Katana and Patel cases* (*supra*). Therefore, any restriction lodged over the suit land as discerned in, inter alia, the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ replying affidavits, the certificate of official search (PExhibit 1) and letters (PExhibits 2 and 3), shall be removed by the 3<sup>rd</sup> defendant forthwith to meet the ends of justice as provided for under sections 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya.

51) Accordingly, this entire suit is hereby dismissed.

52) As regards costs, the basic invariable rule is that the same follow the event and indeed, the ultimate factor on award or non-award of costs is the judicial discretion as per the case of *Rai-v-Rai* (2014) eKLR and the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya. So, the costs of the instant suit shall be borne by the plaintiffs.

53) It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 20<sup>TH</sup> DAY OF JUNE 2023**

**G. M. A ONG’ONDO**

**JUDGE**



**PRESENT**

- a. P. Odhiambo instructed by G.S Okoth learned counsel for the plaintiffs
- b. E. Apondi instructed by V.Migai learned counsel for 1<sup>st</sup> and 2nd defendants
- c. Luanga, court assistant

