



**Owiti v Omolo (Environment & Land Case 56 of 2021)
[2023] KEELC 18352 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 56 OF 2021
GMA ONGONDO, J
JUNE 20, 2023**

BETWEEN

PETER ODOYO OWITI PLAINTIFF

AND

MONICA ACHIENG' OMOLO DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Kabondo/Kasewe/2019 measuring approximately zero decimal four three hectares (0.43 Ha) in area (The suit land herein). The same is located in Kabondo within Homa Bay County.
2. Both the plaintiff and the defendant are acting in person.
3. In the first instance, the defendant was Josephat Omolo Ochola. In the course of the proceedings, it emerged that he was deceased at the time of filing this suit. Thus, he was substituted by his wife, Monica Achieng' Omolo, pursuant to leave of court granted on February 1, 2021.
4. Initially, this matter had been filed at Migori Environment and Land Court. On November 1, 2021, it was transferred to this court, upon its establishment, for hearing and determination.

B. Summary Of The Parties' Respective Cases

5. On January 4, 2021, the plaintiff filed the present suit by way of an amended Originating Summons dated November 26, 2020. The same was brought pursuant to Order 37 Rule 8 of the [Civil Procedure Rules, 2010](#).
6. The plaintiff has sought the orders infra:



- a. That the applicant be declared to have become entitled by adverse possession to part of the suit land that was bought by father Silas Owiti Muga (deceased) measuring 1.75 acres.
 - b. That the sub county land registrar Rachuonyo North, South and East be ordered to register the plaintiff herein, Peter Odoyo Owiti, who is the legal administrator in the estate of Silas Owiti Muga (deceased) as the sole proprietor of a part of the suit land measuring 1.75 acres in area.
 - c. There be an order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the portion measuring 1.75 acres out of the suit land, in any manner whatsoever and/or howsoever.
 - d. The deputy registrar and/or executive officer of the honourable court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the portion measuring 1.75 acres out of the suit land, in favour of the plaintiff, in the event of default by the defendant to execute the necessary transfer instruments.
 - e. Costs of this originating summons be borne by the defendant.
 - f. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
7. The originating summons is anchored on a thirteen (13) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff's lamentation is that vide a sale agreement dated 10th November 1979, his late father, Silas Owiti Muga (the deceased), purchased a portion of the original parcel Kabondo/Kasewe/411 measuring 1.75 acres, from the original defendant Josephat Omolo Ochola, which portion now constitutes the suit land after subdivision. That, however, a transfer was not effected. That the deceased thereafter took possession of the suit land and erected a home thereon.
 8. The plaintiff lamented that following the demise of his parents, the current defendant further subdivided the parcel and transferred it to a buyer. He averred that he has been in occupation of the suit land since 1982. That his efforts to have the matter resolved amicably have failed.
 9. In his testimony, Peter Odoyo Owiti (PW1) who is the plaintiff herein, relied on his originating summons dated 10th August 2020 and supporting affidavit sworn on even date, which were adopted as part of his evidence. He also relied on his list of documents of even date, serial numbers 1 to 7 but produced in evidence a certificate of official search with respect to the suit land, a copy of green card, letter from Deputy County Commissioner- Rachuonyo East Sub-County dated June 30, 2020, a letter from Chief- Kasewe Location dated June 25, 2020, a letter from Chief- Kasewe Location dated April 7, 2020, a letter from Chief- Kasewe Location dated May 5, 2020 and a land sale agreement dated November 10, 1979 (PExhibits 1 to 7 respectively). He stated that he has lived on the suit land since he was born in 1988 to date. That he has a house and cultivates maize, bananas and sugarcane thereon. That the defendant and her family do not occupy the suit land.
 10. During cross-examination, PW1 stated that he was not willing to wait for the defendant to carry out succession in the estate of her deceased husband, the original defendant, who owns the suit land.
 11. John Omolo Agutu, PW2, testified that the suit land is registered in the name of the original defendant. That PW1 lives on the suit land and cultivates the same and that his family started using it in 1980. That the defendant, who is wife of the original defendant, does not live thereon.



12. On cross-examination, DW2 stated that the defendant herein had declined to accompany the plaintiff to the Land Control Board so as to effect transfer of the suit land in favour of the latter.
13. The defendant opposed the plaintiff's application for substitution of the defendant vide a replying affidavit dated 14th December 2021 and duly lodged on January 20, 2022. She asserted that the original defendant died on July 17, 2020, prior to the institution of the instant suit. That the plaintiff having failed to cite her to take out letters of administration ad litem to the estate of the deceased defendant, she lacks capacity to be sued herein. However, she did not file a replying affidavit in response to the main suit.
14. DW1, Monica Achieng' Omollo, the wife to the original defendant, testified that she has the title deed to the suit land in her possession. She produced in evidence title deed to the suit land and a burial permit for the original defendant dated July 15, 2020 (DExhibits 1 and 2 respectively). She averred that the plaintiff built on the land without the consent of the original defendant. That the suit land belongs to her.
15. On cross-examination, DW1 averred that the plaintiff's late parents are not buried on the suit land.
16. DW2, Sylvester Oyugi, relied on his statement dated October 13, 2022 as part of his evidence. In cross-examination, DW2 stated that the original defendant left the suit land to the defendant herein.
17. Thereafter, parties filed submissions. The plaintiff filed submissions dated December 13, 2022 on December 15, 2022 and identified five issues for determination, to wit, was the possession and occupation of the suit land adequate and continuous? Was the occupation and possession open and notorious? Was the occupation and possession adverse to the registered owner? Did the alleged sale of the portion extinguish any claims of adverse possession and who should bear the costs of this suit?
18. The plaintiff submitted that his occupation of the suit land has been open and without secrecy. That the instant case is merited and ought to be allowed with costs. He relied on various authorities including the case of *[Kahindi Ngala Mwangandi -vs- Mtana Lewa](#)* (2014) eKLR, to fortify the submissions.
19. The defendant filed submissions dated April 11, 2023 on April 12, 2023. She submitted, inter alia, that the registered owner of the suit land (the original defendant) is deceased. That the estate of the original defendant is yet to be administered in law. That she is neither a legal representative nor an administrator of the estate. That therefore, the suit against her is fatally defective on ground of want of legal capacity and ought to be dismissed with costs.

C. Issues for Determination

20. 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 and Order 15 of the *[Civil Procedure Rules, 2010](#)*.
21. I have duly considered the entire amended originating summons and the parties' respective submissions. So, the following issues fall for determination:
 - a. Whether the defendant has capacity to be sued herein
 - b. Depending on the outcome of (a) above, whether the instant suit is merited.



D. Discussion and Determination

22. In the case of *Alfred Njau -Vs- City Council of Nairobi* [1983] KLR 625 the Court of Appeal, held inter alia that

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

23. It is trite law that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see *Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama* (2014) eKLR.

24. Notably, the defendant herein is neither a legal representative nor an administrator of the estate of her late husband, the original defendant. No evidence has been adduced by the plaintiff to disprove this fact. It is further commonly acknowledged by the parties that the suit land is still registered in the name of the deceased original defendant.

25. It is trite that a party retains a right to file suit against such party that they deem a right or relief exists or flows from. In his prayers, the plaintiff seeks, among others, a declaration that the plaintiff has become entitled by adverse possession to part of the suit land that was bought by his father Silas Owiti Muga (deceased) measuring 1.75 acres. This, in my view, is a substantial prayer that concerns title of a deceased person.

26. The *Law of Succession Act*, Chapter 160 Laws of Kenya, protects property that is registered in the name of a deceased person. Section 45 (1) of the *Law of Succession Act* (supra) provides as follows:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

It is my considered view that ‘for any purpose’ includes in defence of a suit against the property of the deceased.

27. Suits against the estate of a deceased person is brought by or against the legal representative of the estate. Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya defines a legal representative as a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

28. In the instant case, the court’s attention has been drawn to the fact that the suit land vests in the estate of the deceased. That administration of the estate has not yet occurred. The proper party would be the personal representative of the deceased owner as opposed to his surviving spouse.

29. In light of the foregoing, it is the finding of this court that the defendant is not the right party to the suit. The defendant would be incapable of defending the claim in the absence of letters of grant of administration of the estate of her husband.

30. To that end, it is the finding of this court that the suit by the plaintiff is fatally defective. The same is hereby struck out.

31. The plaintiff shall bear the costs of this suit.



32. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 20TH DAY OF JUNE 2023.

G.M.A ONG'ONDO

JUDGE

Present

The plaintiff in person

The defendant in person

