



**Ogera & another v Obonyo & 4 others; Subcounty Registrar of Lands Bondo (Interested Party)
(Environment & Land Case 2 of 2021) [2023] KEELC 18363 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 2 OF 2021**

**AY KOROSS, J
JUNE 20, 2023**

BETWEEN

ERICK ALLAN ODHIAMBO OGERA 1ST PLAINTIFF

KENNEDY OGERA 2ND PLAINTIFF

AND

JOSEPH OGOLO OBONYO 1ST DEFENDANT

CONSOLATA AKATCH 2ND DEFENDANT

ALICE ATIENO SONGA 3RD DEFENDANT

COLLINS ONYANGO SORI 4TH DEFENDANT

MAXSWEL ASEMBO 5TH DEFENDANT

AND

SUBCOUNTY REGISTRAR OF LANDS BONDO INTERESTED PARTY

JUDGMENT

1. The plaintiffs and defendants are relatives. At first registration, the family of the parties herein were registered as proprietors of three parcels of land namely; Siaya/Ramba/2646, Siaya/Ramba/2636 and Siaya/Ramba/2637. The latter shall be referred to as the 'suit property'.
2. Siaya/Ramba/2646 and Siaya/Ramba/2636 are not the subject of these proceedings. In each parcel of land, a cluster 5 family members were registered as proprietors in common with each proprietor having a 5th share. In total, 15 family members were registered.



3. Siaya/Ramba/2646 was registered in the names of Fanuel Obonyo Okinda ('Fanuel') who was the plaintiffs' grandfather together with 4 other family members who were Otieno Obonyo, Tong'o Okinda, James Sori and Jeremiah Obonyo. They each had a 1/5 share.
4. Siaya/Ramba/2636 was registered in the names of Mikenye Otieno, Manase Ogolo, Edwin Omolo, Owuor Obonyo and Andiwo Obonyo.
5. The suit property was and still is registered in the names of Otieno Obonyo, Edwin Okach, Samwel Songa, Ogolo Okinda and Richard Asembo. The registered proprietors of the suit property appear to be deceased but the legal administrators of their respective estates have not been joined as parties to these proceedings. The defendants are allegedly the beneficiaries of their estates.
6. The plaintiffs' father Daniel Ogera Obonyo ('Daniel') who was a son to Fanuel was a co-plaintiff but he died in the course of these proceedings.

Parties' case

7. By an originating summons dated 21/06/2021 and amended on 25/04/2022, the plaintiffs asserted that they had acquired registrable interests over 1 acre ('defined portion') of the suit property by adverse possession and sought several reliefs;
 - a) They had been in adverse possession of the defined portion for a period of over 12 years and by Section 17 of the *Limitation of Actions Act*, the defendants title to the defined portion had extinguished.
 - b) They be declared the legal owners of the defined portion.
 - c) The defendants be compelled to transfer the defined portion and in default, the Deputy registrar do effect the transfer.
 - d) The defendants be prohibited from evicting them or interfering with the suit property.
 - e) Costs of the suit.
8. The summons was supported by the 1st plaintiff's supporting affidavit deponed on 9/05/2022 together with documents he filed in support of the plaintiffs' case.
9. The 1st defendant who was represented by the firm of Odhiambo BFO & Company Advocates filed a replying affidavit deponed on 13/07/2020. He acceded to the plaintiffs' claim. At the behest of his counsel, he was excused from the proceedings. Despite service, the 4th defendants did not participate in these proceedings.
10. The 2nd, 3rd and 5th defendants were represented by the firm of Lawi Ogutu & Co. Advocates. In opposition, the 5th defendant with the authority of the 2nd and 3rd defendants swore a replying affidavit dated 21/01/2022. The affidavit had several annexures attached to it.

Plaintiffs' evidence

11. Hilda Akinyi Ogera, the plaintiffs' mother, testified as PW1. Her evidence was contained in her oral testimony and written statement. It was her testimony upon her marriage to Daniel, she moved to Fanuel's homestead which stood on the suit property. Fanuel, his wife and Daniel were buried on the suit property. Her occupation was peaceful until the recent past.



12. On cross examination, she asserted Siaya/Ramba/2646 belonged to Fanuel and his cousins. The defendants could be given her portion in Siaya/Ramba/2646 since she had no interest in it. The people who lived in the suit property were Fanuel's relatives.
13. The 2nd defendant testified as PW2. His evidence was contained in his oral testimony and written statement. He largely corroborated PW1's testimony. His family had lived on the suit property since 1968.
14. On cross examination, he testified through a grant, PW1 and her sons succeeded Siaya/Ramba/2646. Except his family, none of the co-owners of Siaya/Ramba/2646 were laying a claim on the suit property. They had lived peacefully on the defined portion and the defendants were not the registered proprietors of the suit property. The registered owners were deceased.
15. The 1st plaintiff testified as PW3. His evidence was contained in his oral testimony, affidavits and written statement. It was his case his family had lived on the suit property from 1968. They occupied approximately 1.6 to 1.5 Ha of the suit property. They lived on the suit property with their uncle and Fanuel.
16. On cross examination, it was his testimony some of the registered owners who were his uncles held the suit property in trust. Similarly, other uncles held other parcels of land in trust. The suit property was set aside for construction of homes while other parcels were for farming. All the registered owners of the suit property had farming portions in Siaya/Ramba/2646. His claim was not on customary trust. His family could never cede a portion of Siaya/Ramba/2646 to the defendants.
17. In re-examination, he testified the registered proprietors of the suit property and Siaya/Ramba/2646 were similar. The defendants had threatened to evict them. All meetings to amicably settle the dispute with the assistant chief had not borne fruit.

2nd, 3rd and 5th defendants' evidence

18. Alice Ongaro Ogola testified as DW1. Her evidence was composed of her oral testimony and written statement. She was the wife of Ogolo Okinda who was one of the registered owners of the suit property. She lived on the suit property.
19. She was present during the adjudication process. Siaya/Ramba/2646, Siaya/Ramba/2636 and the suit property which are adjacent to each other belonged to the larger family.
20. However, at adjudication, they were registered in the names of different family members. Each family member settled in their registered portion. After succeeding his portion in Siaya/Ramba/2646 through probate proceedings, Daniel trespassed onto the suit property. They always had wrangles. For lack of locus standi, the suit against the 2nd, 3rd and 5th defendants should be struck out.
21. On cross examination, it was her testimony the plaintiffs entered the suit property a long time ago. Their occupancy was not peaceful and had they their own parcel of land. Fanuel had a house on the suit property which he constructed forcefully.
22. The 5th defendant testified as DW2. He was the son of Richard Asembo who was one of the registered proprietors of the suit property. His evidence was contained in the replying affidavit, oral testimony and documents he produced in support of his case. It was his case the plaintiffs' interests lay in Siaya/Ramba/2646. They had always disputed the plaintiffs' occupancy and the instant suit was res judicata.
23. On cross examination, he testified his father showed Fanuel where to put up a house. Daniel put up a home on the suit property in 1982.



24. The 3rd defendant testified as DW3. She was the wife of Samwel Songa who one of the of the registered owners of the suit property. Her evidence was composed of his oral testimony and written statement. She lived on the suit property. She corroborated DW1 and DW2's testimonies and testified that just like other family members who had settled on their respective registered portions, the plaintiffs should settle on Siaya/Ramba/2646.
25. On cross examination, it was her testimony she moved to the suit property in 2003 after having lived in town. She did not know when Daniel put up his homestead on the suit property.
26. The 2nd defendant testified as DW4. She was the wife of Edwin Okach who was one of the registered owners of the suit property. Her evidence was composed of her oral testimony and written statement. She corroborated DW1, DW2 and DW3's testimonies.
27. On cross examination, it was her testimony she was present during land adjudication process and Fanuel had already entered the suit property. Daniel put up his house in Fanuel's homestead in accordance with Luo customs. Prior to adjudication, they had no problem with Daniel's occupancy since at the time, anyone could put a house anywhere they deemed fit.
28. On re-examination, it was her testimony after adjudication, Daniel was to relocate to his portion in Siaya/Ramba/2646.

Plaintiffs' submissions

29. Their counsel, M/s Owenga, filed her written submissions dated 30/03/2023. She identified 3 issues for determination ;(a) whether the plaintiffs had met the threshold of adverse possession (b)whether the plaintiffs were entitled to the defined portion, and (c) who should bear the costs of the suit.
30. On the 1st issue, counsel submitted the principles of adverse possession were settled and its legal framework was founded on Sections 7, 13 and 38 of the *Limitation of Actions Act*. Counsel relied on *Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR* which cited *Gachuma Gacheru v Maina Kabuchwa [2016] eKLR* which held adverse possession was to be observed on the land. She also relied on the case of *Mbira v Gachuhi [2002] 1 EALR 137* where the judge held as follows: -
 '...A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...'
31. It was counsel's submission that the plaintiffs had met all the ingredients of adverse possession. Counsel submitted the plaintiffs had proved that they had lived on the suit property peacefully since 1968 without the permission of the owners and had put up homes, buried their dead and planted vegetation.
32. On the 2nd and 3rd issues, counsel submitted that having proved adverse possession, the plaintiffs were entitled to the defined portion and costs.

2nd, 3rd and 5th defendants' submissions

33. Their counsel filed written submissions dated 15/05/2023. He identified a single issue; whether the plaintiffs had met the threshold of adverse possession.
34. Counsel submitted the legal framework of adverse possession were settled in Sections 7, 13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.



35. Counsel submitted notwithstanding it was not in dispute the plaintiffs had lived on the suit property for over 12 years, they had not lived there peacefully, quietly, continuously and uninterrupted. Counsel submitted the plaintiffs' occupancy had been marred by court proceedings and the defendants were not the legal proprietors. To buttress his position, counsel relied the decision of Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2021] eKLR that cited with approval the case of Mtana Lewa v Kahindi Ngala [2015] eKLR.

Analysis and determination

36. I have perused and considered the parties' pleadings, the evidence adduced by witnesses before this court, counsels' submissions and well cited provisions of law and authorities. I shall be guided by them.
37. Before I identify the issues, I will highlight the undisputed facts. The parties are relatives. The defendants are not the registered proprietors. Fanuel lived on the suit property prior to adjudication. He continued living there after adjudication and he and his son Daniel were buried on the suit property.
38. At adjudication, the family were registered as proprietors of 3 parcels of land that belonged to the family including the suit property. Fanuel was allocated Siaya/Ramba/2646 as a tenant in common having 1/5th share. This portion was succeeded by Daniel and now by PW1, the plaintiffs and other sons of Daniel; it was their land. All parcels of land that belonged to the family were adjacent to one another and none of the defendants had laid claim on Siaya/Ramba/2646.
39. I will proceed to sequentially analyze the issues for determination which are: -
- a) Whether the plaintiffs' suit is competent against the defendants.
 - b) Whether the plaintiff proved their claim of adverse possession to the required standards.
 - c) What appropriate orders should be granted.
 - d) Who should bear the costs of the suit.

a) Whether the plaintiffs' suit is competent against the defendants

40. It is settled law a claim of adverse possession is only maintainable against the registered proprietors of the suit property or the administrators of their estates.
41. Although the defendants herein could be beneficiaries of the suit property either as children and wives of the deceased proprietors, they could not be sued in their individual capacities. I find the plaintiffs' suit against defendants incompetent and hereby strike it out. This position was upheld by the Court of Appeal decision of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR as follows: -
- 'It is a settled principle that a claim for adverse possession can only be maintained against a registered owner.'
42. The definition of res judicata is found in Section 7 of the *Civil Procedure Act*. The key ingredients are that the matters must have been directly and substantially been in issue in a former suit, between the same parties, under the same title and determined on merits by a competent court.
43. The 2nd, 3rd and 5th defendants asserted the suit had been determined in Land Dispute Tribunal Case no. 866 of 2001, Siaya HC P&A Cause no. 198 of 2016 and Kisumu ELC Case number 272 of 2013.
44. . Land Dispute Tribunal Case no. 866 of 2001 did not disclose the parcel no. of the land in dispute. Its award and adoption as a judgment of the court was not tendered. Kisumu ELC Case number 272 of



2013 was struck out while in Siaya HC P&A Cause no. 198 of 2016, a counsel's pleadings were struck out. I find the plaintiffs' claim was not res judicata.

b) Whether the plaintiffs proved their claim of adverse possession to the required standards.

45. All the principles of adverse possession must co-exist for one to prove a claim of adverse possession.
46. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal set down some of the issues a claimant must address when seeking to be deemed an adverse possessor; 'A person who claims adverse possession must inter alia show: (a) on what date he came into possession. (b) what was the nature of his possession? (c) whether the fact of his possession was known to the other party. (d) for how long his possession has continued and (e) that the possession was open and undisturbed for the requisite 12 years.'
47. The 2nd, 3rd and 5th defendants acceded the plaintiffs had lived on the suit property for over 12 years. From evidence, they had been in open, notorious and continuous occupation without interruption. However, the satisfaction of these ingredients did not necessary deem them adverse possessors. They needed to prove the registered proprietors had been dispossessed or had discontinued their possession.
48. On the principle of dispossessed or had discontinued possession, the Court of Appeal dealt with it in the decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR which cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21. Dispossession was where a person came in and drove another out of the land. Discontinuance of possession was where the person in possession went out and another person took possession. In *Littledale* Lindley MR expressed himself as follows: -

'The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.'
49. DW4 testified prior to adjudication, the larger family lived together. She was present during adjudication process and subsequent thereto. Fanuel was to relocate to his allocated portion in Siaya/Ramba/2646; which he did not. Her testimony on this was unshaken.
50. They (plaintiffs' witnesses) never led evidence as to whether Fanuel's alleged entry caused some of the registered proprietors to be dispossessed or to discontinue possession. In fact, PW3 alluded the plaintiffs claimed the suit property by way of trust. DW4's evidence was lent credence by the plaintiffs' evidence that their rights over Siaya/Ramba/2646 had never wavered. In other words, their customary rights over land stood on Siaya/Ramba/2646. I find the plaintiffs did not satisfy this limb of adverse possession.
51. On the principle of peaceful occupation, PW2, PW3 and the defendants' witnesses agreed they had severally tried to resolve the dispute over the defined portion by using the government administrative body to no avail. The plaintiffs' witnesses all testified the defendants had threatened to evict them. I find their occupancy was not peaceful.
52. Claims of adverse possession amongst close family relations have posed and continue to pose challenges. The law is now settled that such claims amongst relatives in Kenya have to be traded with carefully. See *Mbui v Maranya* [1993] KLR 726, *Rodgers Mwamboje v Douglas Mwamboje* [2014] eKLR, *John Baraza Ojiambo v Veronica Auma Ojiambo & 3 others* [2013] eKLR and *Samuel Kihamba v Mary Mbaisi* [2015] eKLR.



53. When confronted with an appeal concerning a claim of adverse possession between a step son and mother, the Court of Appeal in the case of Samuel Kihamba v Mary Mbaisi (Supra), expressed itself as follows on claims of adverse possession between close family relations:
- ‘We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.’
54. Even if this court were to interrogate a claim of adverse possession by customary trust as alluded by PW3 and adopt the Court of Appeal decision of Eunice Karimi Kibunja v Mwirigi M’ringera Kibunja [2013] eKLR, it would not suffice. I say so because it is evident the intent of family members at the time of adjudication was to ensure each family held their respective individual parcels of land as a tenant in common and not in trust for each other.
55. In applying the dicta of these decisions which are all from the appellate court and binding on this court, I am not satisfied the plaintiffs proved they were in adverse possession of the disputed portion.
56. In conclusion, had I not struck out the plaintiffs’ case, I would have dismissed their claim. It is trite law costs follow the event. The plaintiffs and defendants are close family relations, in the special circumstances of this case, each party shall bear their respective costs of this suit. I hereby issue the following final disposal orders;
- a. The plaintiffs’ suit is hereby struck out.
 - b. Each party shall bear their respective costs of this suit.

DELIVERED AND DATED AT SIAYA THIS 20TH DAY OF JUNE 2023.

HON. A. Y. KOROSS

JUDGE

20/6/2023

Judgement delivered in the Presence of:

M/S Owenga for the plaintiff

N/A for the 1st defendant

N/A for the 2nd, 3rd and 5th defendant

N/A for the 4th defendant

Court assistant: Ishmael Orwa

