



Abich v Amula (Sued as the Legal Representative of Amula Atudo - Deceased) & another (Environmental and Land Originating Summons 7 of 2022 & 19 of 2021 (Consolidated)) [2023] KEELC 18153 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING
SUMMONS 7 OF 2022 & 19 OF 2021 (CONSOLIDATED)**

GMA ONGONDO, J

JUNE 14, 2023

BETWEEN

KENNEDY OCHIENG ABICH PLAINTIFF

AND

**JOSHUA OKINYI AMULA (SUED AS THE LEGAL REPRESENTATIVE OF
AMULA ATUDO - DECEASED) DEFENDANT**

AS CONSOLIDATED WITH

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 19 OF 2021

BETWEEN

KENNEDY OCHIENG ABICH PLAINTIFF

AND

**HELLEN AOKO AGORO (SUED AS THE LEGAL REPRESENTATIVE OF
AGORO ATUDO - DECEASED) DEFENDANT**

JUDGMENT

A. Introduction

1. The instant consolidated suit resulted from the consolidation of two suits to wit, Homa Bay Environment and Land Court OS No 7 of 2022 and Homa Bay Environment and Land Court OS No 19 of 2021. The twin suits were consolidated by consent of the parties which was recorded in court on 17th April 2023 and OS No 7 of 2022 made the lead file.



2. The plaintiff is represented by the firm of Migele & Company Advocates.
3. Both defendants are represented by the firm of Aluocho Odera and Nyauke Advocates.
4. In the lead file, the suit land is Gem/Kowuor/Kotieno/423 measuring approximately two decimal four hectares (2.4 Ha) in area. In the other file, the suit land is Gem/Kowuor/Kotieno/422 measuring approximately two hectares (2.0 Ha) in area. Both parcels of land are located within Homa Bay County (the suit parcels of land herein).
5. The matters, originally lodged at Migori Environment and Land Court, were transferred to this court on 21st March 2022 and 28th September 2022 respectively, for hearing and determination.

B. Summary Of The Parties' Respective Cases

6. On 13th July 2020, the plaintiff, through his Advocates, filed the suit in the lead file by way of Originating Summons dated 8th July 2020 against the 1st defendant herein. The same was brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 37 Rule 7 of the *Civil Procedure Rules, 2010* and Sections 17 and 38 of the *Limitations of Actions Act* Chapter 22 Laws of Kenya.
7. The plaintiff has sought the orders infra:
 - a. That the plaintiff has acquired title to the suit parcels of land by adverse possession.
 - b. An order of rectification of the Register directing the Land Registrar of Homa Bay to delete the names of Amula Atudo and Agoro Atudo respectively and substitute the same with the name of Kennedy Ochieng Abich as the proprietor of the suit parcels of land and the plaintiff be issued with the title deeds in respect of the suit parcels of land.
 - c. An order vesting titles of the suit parcels of land in the name of Kennedy Ochieng Abich as absolute proprietor and that all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.
 - d. Cost of this suit.
8. In the other file, the plaintiff, through his Advocates, filed suit against the 2nd defendant by way of Originating Summons of even date. The orders sought therein were the same as those in the lead file.
9. The two originating summons are anchored on the supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff contends that he has been in occupation of the suit parcels of land since the 1950s up to date and has tilled the land, buried his loved ones and planted trees thereon. That therefore, he has acquired the suit parcels of land by way of adverse possession. The plaintiff avers that land reference number Gem/Kowuor/Kotieno/423 is registered in the name of one Amula Atudo (deceased) who is the father to the 1st defendant herein, and land reference number Gem/Kowuor/Kotieno/422 is registered in the name of Agoro Atudo, the deceased husband to the 2nd defendant. That both deceased procured registration of that parcels in their names through misrepresentation, fraud and/or deceit.
10. The plaintiff asserted that in 1995, his late father filed a suit at the High Court in Kisii (Civil Case Number 284 of 1995) seeking, among other orders, a declaration that the 1st defendant's late father and the 2nd defendant's late husband hold the title to the suit land in trust for the plaintiff's late father. That, however, his father passed on before the matter could be heard and determined. He therefore, urged the honourable court to grant the orders sought in the Originating Summons.



11. The plaintiff herein, Kennedy Ochieng Abich (PW1), testified on 8th November 2022 and relied on his witness statement and supporting affidavit as part of his evidence. He also relied on his list of documents dated 8th July 2020 Serial Numbers 1 to 4, to wit, photographs of the homestead and the cultivation on land reference number Gem/Kowuor/Kotieno/423, certificate of official search for land reference number Gem/Kowuor/Kotieno/423, a copy of the plaint for Kisii High Court Civil Case No 284 of 1995 and a copy of petition for letters of administration intestate filed by the 1st defendant (PExhibit 1 to 4 respectively), as well as further list of documents dated 14th October 2020 (PExhibits 5 and 6 respectively). He stated, inter alia, that suit at the High Court in Kisii (Civil Case Number 284 of 1995) was dismissed following the demise of his father. That he has never been evicted from the suit land and that he has lived thereon for a period of 42 years without the consent of the defendant and/or his family.
12. During cross-examination, PW1 asserted that he has built a home and lives on the suit land. That the defendant does not occupy the same. That his late grandfather and father are buried thereon.
13. PW2 Samwel Agango Ondiek, an uncle to the plaintiff herein, adopted his statement filed on 13th July 2020 as part of his evidence.
14. PW3, Benson Amula Atudo, an uncle to the plaintiff herein, also adopted his statement filed on 13th July 2020 as part of his evidence. He testified that the defendant started cutting down trees and cultivating the suit land. That the plaintiff is the one utilizing the land, although he stopped cultivating it for some time.
15. The 1st defendant, through his counsel, opposed the suit vide a replying affidavit dated 22nd July 2020 and lodged on 27th July 2020. He stated that there have been several disputes relating to the suit parcels of land, including the suit filed at the High Court in Kisii (Civil Case Number 284 of 1995). That the plaintiff herein has pleaded both fraud and adverse possession. Thus, the instant suit is misguided and constitutes an abuse of the court process. He therefore, urged the court to dismiss the suit and order the plaintiff to vacate the suit land.
16. The 2nd defendant also opposed the suit vide a replying affidavit dated 22nd July 2020 and lodged on 27th July 2020. She deposed, inter alia, that the applicant's possession has not been uninterrupted and urged the court to dismiss the instant suit.
17. DW1, Joshua Okinyi Amula (the 1st defendant herein), relied on his statement dated 4th July 2022 and list of documents of even date, Serial Numbers 1 to 3, to wit, chief's letter dated 22nd June 2022, search certificate for land reference number Gem/Kowuor/Kotieno/423 and a copy of the plaint in Kisii Civil Case No 284 of 1995 (DExhibits 1 to 3 respectively). He also adopted his Replying Affidavit sworn on 22nd July 2020 as part of his evidence. DW1 stated that he is in the process of completing succession in respect of his late father's estate. That he has a right over the suit land and that he lives near the suit land on his uncle's land as he does not have any other land.
18. On cross-examination, DW1 admitted that he only started occupying the suit land in 2020. That the plaintiff's home is on the suit land. Also, that the suit at the High Court in Kisii (Civil Case Number 284 of 1995) was dismissed for want of prosecution.
19. With leave of court, the defendants filed a supplementary affidavit dated 17th April 2023 on even date and sworn by the 1st defendant herein. The defendants reiterated that the instant suit ought to fail as the plaintiff has not met the threshold for grant of the orders sought.



20. Thereafter, parties filed their respective submissions. Learned counsel for the plaintiff filed submissions dated 30th January 2023 on even date and framed a single issue for determination, to wit, whether or not the plaintiff has acquired the suit parcel of land by adverse possession. Counsel submitted that the plaintiff entered into the suit land in the 1950s, and has been in occupation for a period of 42 years. That he has built his home and buried his loved ones thereon. That therefore, the plaintiff has acquired title to the suit land by way of adverse possession. Counsel relied on various authorities including the case of *Wilson Kazungu Katanan & 101 others v Salim Abdalla Bakshwein & another* (2015) eKLR, to fortify his submissions.
21. Learned counsel for the defendants filed submissions dated 6th February 2023 on even date and identified twin issues for determination thus: whether the pleadings support the prayers and whether the evidence supports the claim. Counsel submitted that the plaintiff has not proven his case to the requisite standard.

C. Issues For Determination

22. 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.
23. I have duly considered the entire originating summons, the testimonies of PW1 to PW3 and the plaintiff's submissions as well as the testimonies of DW1 and the defendants' submissions. So, the issues for determination are as captured in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another* (supra) that adverse possession dictates thus;
 - a. The parcel of land must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

D. Discussion And Determination

24. It must be noted that the plaintiff's claim is for the whole of land reference numbers Gem/Kowuor/Kotieno/423 measuring approximately two decimal four hectares (2.4 Ha) in area and Gem/Kowuor/Kotieno/422 measuring approximately two hectares (2.0 Ha) in area, the suit parcels of land herein. Therefore, the plaintiff's claim is over a definite portion of land; see *Muthuita v Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
25. On the issue of registration, PW1 stated that title to Gem/Kowuor/Kotieno/423 is registered in the name of the 1st defendant's father, Amula Atudo (deceased). He produced in evidence, a copy of the search certificate which revealed that the deceased is the proprietor of the suit land with effect from 21st August 1972. Regarding land reference number Gem/Kowuor/Kotieno/422, the plaintiff annexed a certificate of official search (KOA1), showing that the said parcel of land is registered in the name of Agoro Atudo (deceased) with effect from 21st August 1972.
26. As regards open and exclusive possession of the suit land, it is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others* (2017) eKLR.



27. PW1 testified that he has been in occupation of the suit parcels of land since 1950s. That he lives and has buried his loved ones thereat. That he has planted trees and cultivates the suit parcels of land. This is discerned on ground (a) and (d) of the originating summons and his testimony. This evidence was also corroborated by the plaintiff's witnesses. Notably, DW1 admitted that the plaintiff's home is on the suit land.
28. Regarding the third dictate, PW1 stated that he has been in occupation of the suit parcels of land since 1950s. The 1st defendant stated that he only started occupying the suit land in 2020. It is noteworthy that the defendants have never filed an eviction notice against the plaintiff. In fact, the High Court in Kisii (Civil Case Number 284 of 1995) was instituted by the plaintiff's late father, although the same was dismissed for want of prosecution. Clearly, the plaintiff has been in possession of the suit land for a period in excess of 12 years.
29. It is my considered view that the plaintiff has demonstrated that he has been in peaceful and continuous enjoyment and use of the suit parcels of land for a period in excess of twelve years. So, the defendants have been dispossessed thereby; see Halsbury's Laws of England 4th Edition Volume 28.
30. Section 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya provides that he who alleges must prove; see also Wilson Kazungu Katana case (supra).
31. In *Kirugi and another v Kabiya and 3 others* (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities.
32. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendants on a balance of probabilities. He is entitled to the orders sought in the originating summons.
33. Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders 1, 2, 3 and 4 sought on the face of the Originating summons dated 8th July 2020 and as stated in paragraph 7 (a), (b), (c) and (d) hereinabove.
34. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 14TH DAY OF JUNE 2023

G.M.A ONG'ONDO

JUDGE

Present

Mr. Migele, learned counsel for the plaintiff/applicant

Mr. Nyauke, learned counsel for the defendants

Defendant

Ochumba, Court Assistant

