



**Eric (Suing as the legal representative of the Estate of the Deceased,
Omwange Ogato) v Opiyo & another (Environment & Land Case
2 of 2021) [2023] KEELC 19143 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19143 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 2 OF 2021
GMA ONGONDO, J
JULY 24, 2023
FORMERLY KISII ELCC NO. 413 OF 2014

BETWEEN

**OMWANGE KIRERA ERIC (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE DECEASED, OMWANGE OGATO) PLAINTIFF**

AND

PATRICK OGIRA OPIYO 1ST DEFENDANT

OCHIENG OGIRA 2ND DEFENDANT

JUDGMENT

A. Introduction

1. The property in the instant dispute is land reference number West Kasipul/Kodera Karabach/1120 measuring approximately Two Point Four hectares (2.4 Ha) in area (Hereinafter referred to as the suit property).
2. The suit property is registered in the name of the original plaintiff, Omwange Ogato (deceased) with effect from 20th May 1981.
3. The original plaintiff (PW1) died intestate on 6th March 2018. So, the present plaintiff became the legal representative of his estate further to the grant issued on 19th October 2018 in Kisii Chief Magistrate's court Succession Cause number 459 of 2018.

B. The Plaintiff's Case

4. In a re-amended plaint dated 2nd April 2019 and filed in court on 5th April 2019, the plaintiff through Anyona Mbunde and Company Advocates, is seeking the orders infra;



- a. An order of permanent injunction do issue restraining the defendants by themselves, servants, agents and anybody claiming under them from in anyway interfering with the plaintiff's land, damaging, wasting and or doing anything on the suit property and give vacant possession thereof.
 - b. The plaintiff prays for an order to the land Registrar Homabay County to re-instate the boundary features interfered with by the defendants.
 - c. Costs of this suit be provided for.
 - d. Any other alternative relief that this Honourable Court may deem fit to grant sought.
5. In his evidence, PW1 stated that he bought the suit property from 1st defendant who is father of the 2nd defendant in 1979. That the 1st defendant obtained it's title deed after the 1st defendant transferred the same to him. That he then started cultivation of the same. That later, the 2nd defendant chased him from the suit property and destroyed boundaries thereof thus, precipitated this suit. He relied on his list of documents dated 28th October 2014 S/Nos. 1 to 6 (P Exhibits 1 to 6 respectively) which include land certificate (P Exhibit 1).
 6. The plaintiff's counsel filed submissions dated 19th April 2023. He did submission in part that the plaintiff obtained the suit property by way of purchase from the 1st defendant. That he has proved his case while the defendant's counter claim has not been proved to the requisite standards.

C. The Defendants' Case

7. The defendants through Nyambati and Company Advocates filed his statement of defence and counter claim dated 26th November 2014. They denied the plaintiff's claim and alleged fraudulent acquisition of title to the suit property by the plaintiff. Therefore, they prayed for:
 - a. A declaration that the plaintiff was fraudulently registered as a proprietor for the suit property.
 - b. An order for cancellation and rectification of register in the suit property to read the names of the 1st Defendant.
 - c. A declaration that the 2nd Defendant has acquired the suit property by way of adverse possession.
 - d. Cost of the suit and counterclaim.
8. In his testimony, DW1 stated inter alia that he owns the suit property that he was not aware that PW1 is its proprietor. He relied on his statement dated 23rd November 2017 and list of documents dated 26th November 2014 S/Nos. 1, 2, 3 (DEXhibits 1, 2, 3, 4a, 4b and 5 respectively) and a further list of documents dated 23rd November 2017 S/Nos. 1 and 2 (DEXhibits 6 and 7 respectively).
9. DW2 Jorum Ochieng Opiyo relied on his statement dated 23rd November 2017. He stated in part that DW1 lives on the suit property.
10. In the defendants' submissions dated 12th April 2023, counsel cited authorities including; *Garvy v Richards* (2011) JMCA 16, *Embakasi properties Limited and another v Commissions of Lands and another* (2019) KLR, to reinforce the defendants' case.



D. Issues for Determination

11. I have considered the plaintiff's statement of agreed issues dated 5th March 2015 and the defendants' statement of agreed issues dated 25th June 2015. So, have the parties established their respective cases to the requisite standards especially, on the issues of ownership, trespass, fraud and adverse possession in the respect of the suit property? Depending on the outcome of the said question, are the parties entitled to the orders sought in their respective pleadings?

E. Analysis and Determination

12. As regards the issue of proprietorship of the suit property, PW1 stated in examination in chief, that he bought the suit property from the 1st defendant who gave him title thereof. During cross-examination, DW1 confirmed that the suit property is registered in the name of PW1.
13. Ownership of the suit property in the name of PW1, is discerned in the Land certificate and certificate of official search (P Exhibit 1 and 2). Further, the certificate of official search and green card (D Exhibit 1 and 2 respectively), as well as transfer, application for consent, mutation form, sketch and letter of consent (DExhibits 3, 4a, 4b, 5), fortify this position.
14. Evidently, the suit property is registered in the name of PW1 under the repealed Registered Land Act; see Wainaina v Murai and others. (1976-80)1KLR 283.
15. On the issue of trespass, the same is defined in Clerk and Linds on Torts 18th Edition Edition paragraph 18-01. The meaning is noted accordingly.
16. Pertaining to alleged fraud against the plaintiff, the defendants pleaded the particulars thereof at paragraph 13 of the counter claim. Therefore, the allegations are strictly pleaded as noted in the case of Kuria Kiarie and 2 others v Sammy Magera (2018) eKLR.
17. In view PExhibits 1 and 2 as well as DExhibits 1 to 5 which are in favour of PW1, the defendants' allegations of fraud, were not strictly proved as held in Kuria Kiarie case (*supra*). Therefore, the plaintiff's acquisition of the suit property was lawful, formal and free of any encumbrances.
18. To that extent, the defendants have not established their allegations in the counter claim against the plaintiff to the requisite standard; see Gladys Wanjiru Ngacha v Treresia Chepsaat and 4 others (20130 KLR.
19. The defendants claim ownership by adverse possession of the suit property. It must be noted that adverse possession is an overriding interest under section 28 Land Registration Act, 2016 (2012).
20. Clearly, the elements of adverse possession are well settled; See Salim v Boyd (1971) EA 550.
21. The suit property is Two Decimal Four hectares (2.4 Ha) in size as per PExhibits 1 and 2. However, the defendants have not established that they have not possessed the suit property in adverse manner to the title of PW1 for the prescribed period since there has been a dispute over the same between the parties. Moreover, PW1 has not been completely dispossessed of the same.
22. In the premises, I find that the plaintiff has proved his claim against the defendants on a balance of probabilities.
23. On the other hand, the defendants have failed to prove their counter claim against the plaintiff as held in Gladys Ngacha case (*supra*).
24. A fortiori, I enter judgment as infra;



- a. For the plaintiff against the defendant in terms of orders sought in re-amended plaint and as stated in paragraph 4 (a) and (b) hereinabove.
- b. counter claim as stated in paragraph 7 above,
- c. Costs of suit and the counter claim to the plaintiff.

25. Ordered accordingly.

DATED AND DELIVERED AT HOMA BAY THIS 24TH JULY 2023

G.M.A ONG'ONDO

JUDGE

Present

Plaintiff, in person.

Defendant, in person.

Okello, court assistant.

