



Yago & 6 others v Omolo (Being the the legal representative of the Estate of Mastinus Nyanjwa Majiwa alias Martin Nyanjwa - Deceased & 4 others (Environment and Land Miscellaneous Application 70 of 2021) [2023] KEELC 18911 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18911 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 70 OF 2021
GMA ONGONDO, J
JULY 19, 2023

BETWEEN

CORNEL OUNO YAGO 1ST PLAINTIFF
WYCLIFFE OMONDI OUNO 2ND PLAINTIFF
CALEB ODHIAMBO 3RD PLAINTIFF
PAUL MBOYA OTICHA 4TH PLAINTIFF
ANDERICUS RAPUDO OTICHA 5TH PLAINTIFF
SAMUEL OUNO YAGO 6TH PLAINTIFF
JEREMIAH OGUTA OUNO 7TH PLAINTIFF

AND

SETH OTIENO OMOLO (BEING THE THE LEGAL REPRESENTATIVE OF THE ESTATE OF MASTINUS NYANJWA MAJIWA ALIAS MARTIN NYANJWA - DECEASED) 1ST DEFENDANT
LAND REGISTRAR, HOMA BAY COUNTY 2ND DEFENDANT
LAND SURVEYOR, HOMA BAY COUNTY 3RD DEFENDANT
LAND ADJUDICATION OFFICER, HOMA BAY COUNTY 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. On 17th August 2018, the seven plaintiffs through the firm of Odhiambo Kanyangi and Company Advocates commenced this suit by way of an originating summons dated 16th August 2018 pursuant to



Order 37 Rules 7 and 14 of the [Civil Procedure Rules, 2010](#) and section 38 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya. They claim to be *bona fide* possessors and occupiers of land reference number Kanyada/Kanyango/Kalanya/848 measuring eleven decimal one two hectares (11.12 Ha) in area (the suit land herein) by prescription and/or adverse possession for determination of the following issues;

- a. Whether the applicants (plaintiffs herein) have had uninterrupted, open, continuous actual possession, occupation and use of the suit land for over 12 years.
 - b. The Honourable court be pleased to grant an order of perpetual injunction restraining the 1st respondent (the 1st defendant) herein, his agents, servants, representatives, assigns and relatives from interfering with the plaintiffs' peaceful possession and actual occupation of the whole of the suit land in any way whatsoever.
 - c. Whether the plaintiffs are entitled to be registered as proprietors of the suit land in place of the 1st defendant, on account of adverse possession thereof.
 - d. The Deputy Registrar and/or Executive Officer of this Honourable court be ordered/directed to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the whole of the suit land in favour of the plaintiffs.
 - e. Issue further orders that the Honourable court may deem necessary and fit.
 - f. Who shall pay the costs of the suit?
2. The originating summons is rooted in thirteen grounds set out on the face of the same alongside the 1st plaintiff's supporting affidavit of eighteen paragraphs and copies of adjudication record, title deed, succession proceedings, green card and photos marked as "C001 to C00 5" (PExhibits 1 to 5 respectively) and annexed to the affidavit. Briefly, the plaintiffs' lamentation is that during adjudication, the suit land was registered in the name of the late Francis Atieno Yago (Deceased-1) and it is currently, registered in the name of the 1st defendant pursuant to mangled up entries in the green card of the suit land and irreconcilable with the succession proceedings concerning the estate of the late Mastinus Nyanjwa Majiwa (Deceased-2) who never possessed and or occupied the same. That the plaintiffs and their respective families have had uninterrupted, continuous occupation and possession of the suit land since 1979. That the same is their ancestral land therefore, precipitating this suit.
 3. By a replying affidavit of 13 paragraphs sworn on 11th September 2018 and filed on 18th September 2018, the 1st defendant through Obach and Partners Advocates deposed in part, that the plaintiffs' claim is baseless, lacks merit, a waste of judicial time and resources thus, ought to be dismissed with costs. That the 1st defendant's late father leased out the suit land and the same expired upon his demise. That adverse possession cannot be claimed on the property of the said deceased.
 4. The 1st defendant further deposed that the plaintiffs took advantage of the death of the 1st defendant's father and grandfather and the notion that there was no beneficiary thereof and took possession, occupation and use of the suit land. That the 1st defendant obtained a confirmation of grant dated 30th November 2017 in Homa Bay Chief Magistrate's Court Succession Cause number 54 of 2017 in respect of deceased-2. That the plaintiffs have concealed actual facts in a ploy to defeat the interest of justice herein.
 5. The 2nd, 3rd and 5th defendants were duly served as shown by an affidavit of service sworn on 17th September 2018 and filed on 18th September 2018 by a licenced process server, Tom M Obingo. However, they filed no response in this suit and their case was deemed closed on 1st March 2023.



6. In a replying affidavit of fifteen paragraphs sworn on 6th December 2018 by Joan M Eredi, the 4th defendant through the 5th defendant asserted, *inter alia*, that during demarcation process that began in 1970 for Kalanya Adjudication Section (The Adjudication Section herein), all persons were given notice to make any claim regarding their boundaries to the demarcation officer in line with the [Land Adjudication Act](#) Chapter 284 Laws of Kenya. That there was a double entry to the effect that deceased-1 was the owner of land reference number Kanyada/Kanyango/Kalanya/847 (Exhibit DLA & SO 1) and the suit land. That the latter entry was cancelled in favour of deceased-2 and that deceased-1 raised no objection thereto.
7. Also, the 4th defendant affirmed that the board was the available forum for addressing emerging disputes during recording of rights during the adjudication process. That after completion of recording of interest, the section was published on 7th June 1991 when owners were given 60 days to inspect the adjudication registers and map for correctness, completeness and file objections if issues arose from the registers (Exhibit DLA&SO 2). That no objection was raised thereof and no consent was obtained from the Adjudication officer to file this suit thus, the plaintiffs did not exhaust the available legal mechanism under the [Land Adjudication Act](#) (*supra*).
8. It must be noted that Ms Opiyo learned counsel for the 5th defendant did participate throughout the hearing of the plaintiffs' case.
9. By a supplementary affidavit sworn on 23rd November 2018 by the 1st plaintiff for and behalf of the other plaintiffs and himself, it is deposed partly that he is the son of the late Zaphania Ouno Yago (Deceased 3) who until his demise lived on and cultivated the suit land. That Deceased 2 and the 1st defendant did not objection to the use of the suit land. That the plaintiffs have used the same for more than 12 years.
10. The 1st Plaintiff (PW1) relied on his statement dated 23rd October 2019, his supporting affidavit to the originating summons and PExhibits 1 to 5 as part of his evidence. He stated, *inter alia*, that he has possessed and occupied the suit land for 19 years without any interruption.
11. PW2, the 3rd plaintiff herein, testified that he has been cultivating the suit land and relied on his statement dated 23rd October 2019 as part of his testimony. Further, he relied on PExhibits 1 to 5 in this suit.
12. PW3, Francis Okech Awino stated in part that he was born in 1960 and the plaintiffs are his neighbours. That he witnessed adjudication process in the adjudication section in 1980. His statement dated 23rd October 2019 forms part of his evidence.
13. PW4, Wilson Muga Ombogo testified, *inter alia*, that deceased-1 was the first registered owner of the suit land and no person raised objection during the adjudication process in the adjudication section. He relied on his statement dated 23rd October 2019 as part of his testimony.
14. DW1 was the 1st defendant who stated in part that the plaintiffs are his neighbours and that the suit land belonged to his grandfather, Deceased-2. That he is seeking his right to the suit land. As part of his testimony, he relied on his replying affidavit sworn on 12th February 2019 and list of documents dated 7th November 2022 serial numbers 1 and 2 (1st DExhibits 1 and 2).
15. DW2, Nelson Akoth Otieno told the court that he is an uncle to DW1 who has been sued by the plaintiffs over the suit land. That Deceased-2 became the registered owner of the suit land in 1978 and cultivated the same until his demise in the year 2004. This witness relied on his statement dated 7th November 2022 as part of his evidence.



16. In the submissions dated 23rd May 2023, learned counsel for the plaintiffs referred to the pleadings and testimonies of the plaintiffs alongside those of the 1st defendant herein. Counsel submitted that the plaintiffs have proved adverse possession requirements over the suit land hence, their claim be allowed accordingly. To fortify the submissions, counsel relied on the case of *Mucheru Kariuki Mwenda v Karanja Jessie* (2022) eKLR.
17. By the submissions dated 15th May 2023 and filed on 31st May 2023, learned counsel for the 1st defendant set out brief facts of the case including the originating summons and other pleadings on record as well as delineated twin issues for determination, *inter alia*, whether the plaintiffs have acquired the suit land by adverse possession. Counsel discussed the issues against the plaintiffs' claim and relied upon sections 7 and 13 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, Article 60 of the *Constitution* of Kenya, 2010, *Maweu v Liu Ranching and Farming Cooperative Society* (1985) KLR 430, *Mbira v Gichuhi* (2002) EA 137, *Littledale v Liverpool College* (1900) 1 CH,19, 21 and other authorities, to buttress the submissions. Thus, counsel implored the court to dismiss this suit for being baseless, devoid of merit, a waste of judicial time and resources.
18. The 2nd, 3rd, 4th and 5th defendants did not file any submissions herein.
19. On 1st July 2019 and 4th November 2019, the court gave directions, *inter alia*, that originating summons, replying affidavits and supplementary affidavits be treated as a plaint, statements of defence and reply to the said statements of defence respectively in line with Order 37 Rule 19 of the *Civil Procedure Rules, 2010*. That this suit be heard by viva voce evidence.
20. On 18th January 2021, the court allowed the plaintiff's application that the originating summons be amended on it's heading/title to read that;

“The 1st defendant being the legal representative of the estate of Mastinus Nyanjwa Majiwa alias Martin Nyanjwa instead of just the name of the 1st defendant as shown therein.”
21. In the foregone, the issues that emerge for determination are whether;
 - a. The plaintiffs' claim has met the triple elements of adverse possession in respect of the suit land.
 - b. depending on the outcome of the first issue hereinabove, are the plaintiffs entitled to the orders sought in the originating summons?
22. The 1st element is that the suit property must be registered in the name of a person other than the applicant. Notably, ground 6 of the originating summons, paragraph 8 of the 1st plaintiff's supporting affidavit as well as paragraphs 5 and 13 of the 4th defendant's replying affidavit point to the registration of the suit land in the name of deceased-2.
23. According to PExhibits 1 and 2, the suit land was registered in the name of deceased-2 and Joseph Amolo Nyanjwa (Deceased 4) and each owned half share thereof as at 15th December 2003 and title deed issued on 28th November 2014 accordingly. Currently, the same is registered in the name of DW1 and Deceased 4 with effect from 1st February 2018 and each is holding half share thereof further to Homa Bay Chief Magistrate's Court Succession Cause 54 of 2017 as shown in PExhibits 3 and 4 as well as 1st DExhibits 1 and 2.
24. Indeed, under cross examination by the plaintiffs' counsel, DW1 affirmed thus;

“.....the suit land is in my name and that of my late father.....”



25. Regarding the 2nd element namely exclusive possession of the suit land for a period in excess of twelve years, PExhibits 1 to 4 and 1st DExhibit 2 reveal that the suit land is approximately eleven decimal one two hectares (11.12 Ha) in area. No doubt, the plaintiff's claim is for the whole of the suit land as observed in the case of *Gatimu Kinguru v Muya Gathangi* (1976-80) 1 KLR 317.
26. It is established law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others* (2017) eKLR.
27. I note PExhibit 5 (photos) being the plaintiffs' presentation of possession of the suit land herein. In the case of *Salim v Boyd* (1971) EA 550, the court was emphatic that in an adverse possession claim, the applicant must prove exclusive uninterrupted possession of the land in question for a period in excess of 12 years.
28. Evidently, ownership of the suit land changed from deceased 2 to DW1 and deceased 4. Be that as it may, it is trite law that mere change of ownership of land which is the subject matter of a claim to title under adverse possession cannot, per se, defeat the claim; see *Githu v Ndeete* (1984) KLR 776.
29. At paragraph 5 of the replying affidavit of DW1 and submissions, it is averred that his grandfather and father leased the suit land to the grandfather and father of plaintiffs. In the supplementary affidavit, the plaintiffs did not controvert the averment. Therefore, adverse possession cannot arise in the uncontroverted scenario where the plaintiffs had been given permission by the owner to be in possession of the suit land as noted in *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau* (2013) eKLR and *Samuel Kihamba v Mary Mbaisi* (2015) eKLR.
30. The 3rd element of adverse possession relates to dispossession of the suit land. Under cross examination, PW1 stated that he was an adult in 1991 and does not stay on the suit land. That the 1st defendant who was born in 1985, occupies the same.
31. Clearly, adverse possession is an overriding interest under section 28 (h) *Land Registration Act*, 2016 (2012). Since DW1 is still in possession and occupation of the suit land, dispossession of the it's owner does not arise in the circumstances as noted in the Halsbury's Laws of England 4th Edition Volume 28.
32. It is important to note that the *Land Adjudication Act* Chapter 284 Laws of Kenya at the preamble sets out the objective of the Act namely to provide for the ascertainment and recording of rights and interests in Trust Land and connected purposes. Sections 26 to 29 of the Act stipulate an exhaustive and appropriate mechanism for resolution of any disputes arising during land adjudication process including final determination by the Minister.
33. In the present matter, it is crystal clear that no objection was raised to attract the process of dispute resolution as envisaged under the Act. So, deceased 2 was registered as owner of the suit land and issued with title accordingly.
34. Under cross examination by Mr Obach for the 1st defendant, PW1 affirmed that the registered proprietor of the suit land is the 1st defendant after cancellation of double entry as captured in Pexhibits 4 and 5 alongside the 4th defendant's replying affidavit at paragraph 5. That he was an adult but did not inspect the adjudication record (PExhibit 1).
35. Also, during cross examination by Opiyo for the 5th defendant, PW1 stated that the 1st defendant owns the suit land. That his (PW1) late father did not object to the Minister. Further, PW2 and PW3 could not tell of any such objection.



36. Under cross examination by the plaintiff's counsel, PW4 stated that he was present during the demarcation of the original land that bore the suit land. Furthermore, in cross examination by Ms Opiyo learned counsel for the 5th defendant, he stated;

“.....I am not aware of any objection raised to adjudication process thereof.....”

37. Section 30 (1) of the [Land Adjudication Act](#) governs staying of land suits. That no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final unless with the consent of adjudication officer. The plaintiffs never sought such consent as stated at paragraph 12 of the 4th defendant's replying affidavit. Under cross examination, PW1 confirmed that he was not aware that the suit was to be filed in court with the consent of the adjudication officer.

38. In the circumstances, it is settled law that where there is clear procedure of redress of any particular grievance, the same be adhered to since there are good reasons for such special procedures; see [Speaker of National Assembly v Njenga Karume](#) (1992) KLR 21

39. Similarly, this court is guided by the exhaustion principle, a sound one and serves the purpose; see [Geoffrey Muthiga Kabiru and 2 others v Samuel Munga Henry & 1750 others](#) (2015) eKLR.

40. Sections 107 to 109 of the [Evidence Act](#) Cap 80 administer the burden of proof, incidence of burden and proof of particular fact respectively. It is established law that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see [John Kinyanjui Njogu v Daniel Kimani Maingi](#) (2018) eKLR.

41. To this end, I find that this is neither an appeal nor a judicial review arising from any determination of the instant dispute. The plaintiffs are not entitled to the orders sought in the originating summons as they have not established their claim to the requisite standards.

42. A fortiori, the present suit be and is hereby dismissed.

43. Costs of this suit shall be borne by the plaintiffs pursuant to the proviso to section 27 (1) of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.

44. It is so ordered

DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JULY, 2023

G M A ONG'ONDO

JUDGE

