



Ligawa v Makunjo & another (Environmental and Land Originating Summons E004 of 2021) [2023] KEELC 20951 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2021**

GMA ONGONDO, J

OCTOBER 25, 2023

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT (CAP 22 LAWS OF KENYA)**

AND

**IN THE MATTER OF THE REGISTERED LAND
ACT (CAP 300 LAWS OF KENYA) NOW REPEALED)**

AND

**IN THE MATTER OF AN APPLICATION FOR THE DECLARATION
OF ACQUISITION BY ADVERSE POSSESSION OF LAND
REGISTERED UNDER THE REGISTRATION LAND ACT**

BETWEEN

LUKE WAUDA LIGAWA PLAINTIFF

AND

LEO MAKUNJO ALIAS LEONARD ODERO LIGAWA 1ST DEFENDANT

AKELLO LIGAWA ALIAS SIMEON AKELLO LIGAWA 2ND DEFENDANT

JUDGMENT

1. The present determination is delivered in the spirit of Black's Law Dictionary 10th Edition at page 970 where the term "Judgment" means;

“A court's final determination of the rights and obligations of the parties in a case.”

2. The dispute herein pertains to land reference number Homa BAY/Kawere/Konyango/Karanding/1216 measuring approximately Two Decimal Four Two hectares (2.42 Ha) in area (The



- suit property herein). It is contained in Registry Index Map number 17 and located within Homa Bay County.
3. By way of an originating summons dated 20th November 2021 and lodged in court on 29th November 2021, the plaintiff who appears in person, brought this suit pursuant to Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 seeking determination of the questions, inter alia;
 - a. Whether the plaintiff qualifies to claim the said portion presently occupied by way of adverse possession?
 - b. Whether an order of injunction should be issued against the defendants jointly and severally, the family members, agents, servants or anybody deriving authority from them from dispossessing evicting or in any way interfering with the plaintiff's peaceful occupation, cultivation, any other use and quiet enjoyment of the suit property.
 - c. In case the defendants do refuse to transfer a portion thereof to the plaintiff then whether the Honourable court should issue an order directing the Land Registrar and Surveyor to demarcate, carry out survey and register the portion in equal share with the defendants.
 - d. Whether the defendants should be condemned to pay costs of the suit together with interest to the plaintiff.
 - e. Such order may be made as the Honourable Court deems fit to grant.
 4. In a Replying Affidavit of twenty paragraphs sworn on 14th February 2022 and filed in court on 15th February 2022, the 1st defendant who appears in person, averred in part that he is the last born child of Iphraim Kuni Ligawa (Deceased-1) and Hellen Oyoo Ligawa (Deceased-2) who during their lifetime, sub divided their properties amongst his (1st defendant) and his siblings in the following manner;
 - a. Simeon Akello Ligawa and Leo Odero Ligawa jointly to share the suit property.
 - b. Joseph Ochieng Ligawa (Deceased-3) Land Parcel Number HomaBay/Kawere/Konyango/Karanding/1231.
 - c. Luke Wauda Ligawa Parcel Number/Kawere/Konyango/Karading/1242 and 1232.
 - d. Daniel Kuni Ligawa (Deceased-4) Land Parcel No. HomaBay/Kawere/Konyango/Karading/1217
 5. Also, the 1st defendant deposed that after the death of Deceased-2 in the year 1987, he learnt that the plaintiff who is his elder brother, had become landless since he had sold the two parcels of land given to him by Deceased-1. That he took pity of the plaintiff and gave him a quarter (1/4) portions from each share of their land as shown in a copy of agreement marked as "LOL-1" attached to the replying affidavit. That he is more than willing to give the plaintiff the ¼ acre share of the land that he is demanding hence this suit is unwarranted. That the plaintiff however should be willing to cater for the expenses that pertain the transfer process to conclusion to enable him obtain his title deed. That the plaintiff is only entitled to ¼ share of the suit property which he had promised to give him.
 6. By his replying affidavit of even date, the 2nd defendant reiterated almost all the contents in the 1st defendant's replying affidavit including that the plaintiff is only entitled to a quarter portion of share of the suit property which he had promised to give him. He added at paragraph 19 as follows;

"That I however came to learn that the plaintiff herein used part of the proceeds of the sale to buy land from one Luka Gor Jakaudha."



7. The suit was heard by way of viva voce evidence pursuant to the court's directions of 23rd June 2022.
8. Further to the consent of the parties and under sections 18 and 19 of the *Land Registration Act*, 2016 (2012), among other provisions of the law, on 31st January 2023, the court directed, inter alia;
 - a. The HomaBay Land Registrar together with HomaBay County Surveyor to visit the suit property to ascertain the approximate situation, its boundaries well as precise position of the same and fix the boundaries in respect of the plaintiff and the defendants who are allegedly in possession and occupation of the land and its portions and file a report(s) in this court on or before 24th March 2023.
 - b. The Land Registrar and County Surveyor to involve the area Chief, Olala Capis and his elders as well as the parties respective spouses and children during the exercise".
9. Consequently, a report Ref. SK.CO/HB/VOL.VI/101 dated 27th April 2023 from the Ministry of Lands, Public Works, Housing and Urban Development authored by the County Surveyor, Homa Bay (The report herein), reveals that both the Land Registrar and Land Surveyor did visit the suit property on 25th April 2023. The findings thereof are that the plaintiff and the defendants utilize the suit property which houses four buyers with a well demarcated live fence between them and that;
 - a. Luke Wauda Ligawa- The plaintiff occupies 0.3 Ha with a well fenced barbed wire and live fence as his boundary.
 - b. There is a buyer by the name Nick Juma who purchased the land from Leo Makunja and Simon Akello with a measurement of 0.20 Ha.
 - c. Leo Makunja occupies 0.60 Ha.
 - d. Simon Akello occupies 0.97 Ha.
 - e. There is a buyer by the name Leah Achieng Achola who purchased the land from Leo Makunja and Simon Akello with an acreage of 0.020 Ha.
 - f. There is a buyer by name Odiwuor, who purchased the land from Leo Makunja and Simeon Akello with an acreage of 0.08 Ha.
 - g. There is a buyer by the name Babu Opere who purchased the land from Leo Makunja with an acreage of 0.28 Ha.
10. The area chief, Olala Capis authored a letter ref. E004 dated 4th September 2023 which refers to the report. It reads in part;

“All the three brothers and two of their wives in attendance during the sitting have unanimously agreed that boundaries be retained as per surveyor's report dated 24th 24/05/2023.”
11. In the foregone, the issues for determination in this suit are as stated on the face of the originating summons which crystalize to whether the report alongside the chief's letter determined the dispute herein?
12. The report was presented in court pursuant to sections 18 and 19 of the *Land Registration Act*, 2016 (2012). As discerned in an issue for determination namely number nine (9) set out on the face of the originating summons and as stated in paragraph 3 (c) hereinabove, the mandate of the Land Registrar and Surveyor come in very handy as captured in the report.



13. Clearly, the instant dispute relates to survey, demarcation and registration of the suit property. Both the Land Registrar and Surveyor visited the suit property as mandated by the law. Their technical ability to deal with the dispute generated the report; see *Andrew Marigwa-vs-Josephat Ondieki Kebati* (2017) eKLR.
14. It must be noted that a fair opportunity to be heard is a fundamental principle of justice; see *Halsbury's Laws of England* 5th Edition 2010 Volume 61 paragraph 639 and the Court of Appeal decision in *James Kanyiita Nderitu and another-vs-Marios Philotas Gbikas and another* (2016) eKLR.
15. Indeed, the court gave the parties an opportunity to respond to the report as disclosed in the court proceedings of 12th June 2023 and 27th September 2023. The plaintiff urged the court to go by the report. The 1st defendant stated that he was contended with it as the 2nd defendant implored the court to rely on the same.
16. It is noted that the Chief's letter spoke to the report. This is consistent with Article 159 (2) (c) of *the Constitution* of Kenya 2010.
17. Where there is a clear procedure of redress of any particular grievance, the same has to be adhered to since there are good reasons for such special procedure; see *Speaker of National Assembly-vs- Karume* (1992) KLR 21.
18. It is trite that exhaustion principle is a sound one and serves the purpose; see *Geoffrey Muthiga Kabiru and 2 others versus Samuel Muguna Henry and 1756 others* (2015) eKLR.
19. Sections 48 to 54 of the *Evidence Act* (Cap 80 Laws of Kenya) provide for opinion evidence. On the facts and circumstances of the case, the report is acceptable as noted in *CD Desouza-vs-BR Sharma* (1953) KLR 41 42, *Marigwa case (supra)*, *Registered Trustees, Legio Maria Africa Church Mission-vs Simeon Nyamweya Obwocha* (2018) eKLR, among other authorities.
20. It is therefore, the finding of this court that the report as affirmed by the chief's letter and the parties herein, has finally determined all the issues in dispute. I would endorse the report as judgment of this court.
21. A fortiori, judgment be and is hereby entered in terms of the findings in particular, numbers 1, 2, 3, 4, 5, 6, and 7 of the report and the conclusion thereof.
22. Taking into account the nature of the dispute including the relationship between the parties, each party to bear his own costs of this suit; see *Samuel Kamau Macharia -vs-Kenya Commercial Bank Ltd and 2 others* (2012) eKLR.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 25TH DAY OF OCTOBER 2023

G. M.A ONG'ONDO

JUDGE

PRESENT

1. 1st defendant in person
2. 2nd defendant in person
3. Luanga, court assistant

