



Odero (Suing as the Administrator of the Estate of Caren Aomo Odero - Deceased) v Siso (Sued as the Administrator of the Estate of Siso Ongono Alias Joseph Siso Omolo - Deceased) (Environment and Land Appeal E037 of 2022) [2023] KEELC 21677 (KLR) (21 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E037 OF 2022
GMA ONGONDO, J
NOVEMBER 21, 2023**

BETWEEN

**DAVID OTIENO ODERO APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF CAREN AOMO
ODERO - DECEASED**

AND

**KENNEDY OTIENO SISO RESPONDENT
SUED AS THE ADMINISTRATOR OF THE ESTATE OF SISO ONGONO ALIAS
JOSEPH SISO OMOLO - DECEASED**

*(Being an appeal from the judgment and decree of Hon. Tom Olando,
Principal Magistrate, delivered on 4th August 2022 in Homabay Chief
Magistrate's Court Environment and Land Case No. E048 of 2021)*

JUDGMENT

1. This is an appeal that arises from the trial court's judgment delivered on the 4th August 2022 by the Honourable Tom Olando, Principal Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No. E048 of 2021 where he entered judgment as against the defendant as prayed.
2. The appellant namely David Otieno Odero through the firm of Nancy Nyarige and Company Advocates mounted the appeal by way of a memorandum of appeal dated 25th August 2022 and filed herein on 29th August 2022. The Appeal is anchored on grounds 1 to 9 as set out on the face thereof and the same include:



- a. The learned trial magistrate erred in the law of evidence in basing his decision on facts which were not contained in the evidence on record but on his own opinion and on speculation and further on contradictory evidence presented by the respondent:
 - i. There was no evidence, land surveyor's report and or any other document presented confirming that what was occupied and or utilized by the respondent was a portion of land parcel number Kanyada/Kanyabala/1169 or Kanyada/Kanyabala/1168 and that the same was measuring approximately 0.4 hectares.
 - ii. There was no further evidence that the portion allegedly allocated to Joseph Omolo Siso to settle on was a portion of land measuring approximately 0.4 hectares, and further there was no proof of the said allocation presented by the respondent.
 - iii. The respondent in his plaint claimed for a portion of land measuring approximately 0.4 hectares to be excised from land parcel numbers Kanyada/Kanyabala/1169 or Kanyada/Kanyabala/1168 yet in evidence he only claimed a portion of Kanyada/Kanyabala/1169 which on the documents provided and presented to court was measuring 0.07 hectares; the trial magistrate therefore could not purport to award a portion measuring approximately 0.4 hectares which portion is bigger than the suit property.
 - b. The learned trial magistrate erred in law in deciding that the respondent had proven their claim of adverse possession yet the ingredients required to prove such a claim was not presented or proven on a balance of probability by the respondent.
3. Wherefore, the appellant has sought that this court quashes the decision of the trial magistrate, set aside the decree, find that the respondent failed to prove his case on a balance of probability and further award costs to the appellant.
 4. The appellant filed a notice of intention to act in person dated 11th July 2023.
 5. The appeal was heard by way of written submissions pursuant to this court's directions of 19th June 2023.
 6. Accordingly, the appellant filed submissions dated 11th July 2023 and submitted on the following four issues:
 - a. Ownership of land parcel number Kanyada/Kanyabala/1169?
 - b. Errors in fact and law on determination of the judgment.
 - c. Jurisdiction of high court to maintain *status quo*.
 - d. Who pays costs?
 7. In discussing the issues, the appellant submitted, *inter alia*, that the respondent's claim that land parcel number Kanyada/Kanyabala/ 1169 measures 0.4Ha instead of 0.07 Ha cannot be ascertained since no survey has ever been done to determine the same. That the respondent's continued occupation of a portion of the suit land is infringing on the appellant's rights. That the parcel of land that belongs to the respondent is Kanyada/Kanyabala/1170. That in 1979, the suit land was registered in the name of Siso Ongono (deceased) and Odero Opoko. That the said Siso Ong'ono is not Joseph Siso Omolo, the respondent's father.



8. The respondent's counsel filed submissions dated 14th August 2023 and submitted that the respondent has been in possession of the entire suit land peacefully, without force and secrecy for a period exceeding 12 years and has therefore, acquired a portion of the suit land through adverse possession. Counsel relied on the case of *Josinter Atieno Ouma and another -vs- Joshua O. Omiti and another* (2018) eKLR, to buttress the submissions.
9. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
 - a. Has demonstrated that this appeal is tenable and
 - b. Is entitled to the orders sought in the memorandum of appeal.
10. It is noteworthy that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni-vs Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in other cases, *inter alia*, *Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
11. At the trial court, the suit was commenced by way of a plaint dated 20th August 2021 mounted by the plaintiff/respondent against the defendant/appellant and the Hon. Attorney General seeking the following orders;
 - a. An order of declaration that a portion of either land parcel number Kanyada/Kanyabala/1169 in the name of Caren Aomo Odero and Siso Ongono or Kanyada/Kanyabala/1168 in the name of Odero Opoko measuring approximately 0.4 of a hectare or thereabout has been acquired by the plaintiff by adverse possession or is having overriding interest on the said portion of land and in accordance with Section 28(h) of the *Land Registration Act* and the same should be excised from either or both parcels and registered in the name of Kennedy Otieno Opoko.
 - b. An order of declaration that the homestead of Siso Ongono and the surrounding gardens all measuring 0.4 of a hectare be allocated a registration number in accordance with survey map for Kanyada/Kanyabala Registration Section, Edition 62 Sheet No. 5.
 - c. An order of permanent injunction restraining the 1st defendant, his servants, employees, workers or agents or anybody deriving title or authority through him from entering into, cultivating, erecting buildings thereon or in any way making any claim thereto or doing anything thereon adverse to the interest of the plaintiff.
 - d. Costs of the suit and interest thereon at court rates as provided by Section 27(2) of the *Civil Procedure Act*.
 - e. Such further or other alternative relief as this honourable court deems fit to grant.
12. The plaintiff contended that in the 1950s, one Opoko, grandfather of the appellant, invited the plaintiff's father, Joseph Omolo Siso and gave him a portion of his land, the suit land herein, measuring 0.4 hectare to settle on as the later had been displaced when his land was acquired through compulsory acquisition. That during adjudication, the suit land was registered in the names of the plaintiff's father and the defendant's father and later, the defendant's mother. That although the suit land measures 0.4 Ha on the ground, a search disclosed that its acreage is actually 0.07 Ha. That he has acquired the suit land by way of adverse possession.
13. The respondent, Kennedy Otieno Siso (PW1), adopted his statement as part of his evidence. He testified that the suit land is registered in the name of his late father and the defendant's mother, Caren



- Aomo Odero. That the suit land was allocated to his father in the 1950s. That the defendants do not live thereon and have never cultivated the same. That he has lived on the suit land for over 40 years.
14. In his testimony, PW1 produced a copy of grant of letters of administration ad litem, a grant of letters of administration dated 5th March 2021, a copy of the adjudication record for land parcel number Kanyada/Kanyabala/1169, a copy of the adjudication record for land parcel number Kanyada/Kanyabala/1168, a copy of green card for land parcel number Kanyada/Kanyabala/1169, a certified copy of green card for land parcel number Kanyada/Kanyabala/1168, a copy of letter dated 23rd March 2015, a letter dated 23rd may 2016, a bundle of photographs (PExhibits 1 to 9 respectively).
 15. During cross-examination, PW1 stated that it is the appellant's late grandfather who gave them the suit land (parcel number 1169) and welcomed them onto the same. That that is where his interest is.
 16. In his statement of defence, the defendant/appellant herein denied the claim and sought that it be dismissed with costs. That he in fact, lodged a complaint with the Chief, Arujo Location since the plaintiff/respondent had frustrated efforts to have the land subdivided between them and each party issued with a separate title deed.
 17. DW1, the appellant herein, adopted his statement as part of his evidence. He produced in evidence a copy of green card for land parcel number 2252, a copy of green card for land parcel number 1170, a copy of mutation form, a copy of search for land parcel number 2042, a copy of search for land parcel number 2720, a copy of receipt, a copy of certification for confirmation of grant, a copy of letter to G. S. Okoth Advocates, a copy of temporary grant, a copy of chief's letter dated 23rd March 2015 and a copy of chief's letter dated 23rd March 2016 (DExhibits 1 to 11 respectively).
 18. In cross-examination, DW1 stated that his father permitted the plaintiff's father to utilize part of the suit land parcel number 1169. That his family initially cultivated the land and are currently in utilizing the same for grazing.
 19. On his part, the 2nd defendant filed a statement of defence dated 29th September 2021 and filed on 14th October 2021 opposing the claim.
 20. In the impugned judgment, the learned trial magistrate observed, *inter alia*;

“...the evidence tendered by the plaintiff was not challenged, the plaintiffs have proved that they have been using the suit land Kanyada/Kanyabala/1169 undisturbed for over 12 years...”
 21. The appellant contends that the trial court erred in law in deciding that the respondent had proven their claim of adverse possession yet the ingredients required to prove such a claim was not presented or proven on a balance of probability by the respondent. That further, the trial magistrate erred by awarding the respondent a portion of the suit land parcel number Kanyada/Kanyabala/1169 measuring approximately 0.4 hectares, which portion is bigger than the acreage of the suit land.
 22. The respondent's claim at the trial court was for a portion of either the suit land or land parcel number Kanyada/Kanyabala/1168 in the name of Odero Opoko measuring approximately 0.4 of a hectare or thereabout. However, I note that the title for land parcel number Kanyada/Kanyabala/1168 was closed in the year 1998, following subdivision. Also, I note that during his testimony, the respondent clarified that his interest lay in the suit land herein.
 23. Besides, what is the acreage of the portion of the suit land claimed by the plaintiff? Whilst the plaintiff averred that the portion of the suit land he occupies measures 0.4 Ha in area on the ground, the copy of green card produced as PExhibit 5, showed the total acreage of the suit land as 0.07 Ha. No surveyor's



report was produced in evidence by the respondent to ascertain the actual acreage of the portion of the suit land that is occupied by the plaintiff herein. So, the plaintiff's claim was not over definite portions of land.

24. In the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another* (2015) eKLR, the Court of Appeal stated 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
25. In the instant case, the suit land is registered in the names of the respondent's late father, Siso Ongono and the appellant's late mother, Caren Aomo Odera. This is evidenced by a copy of the green card, PExhibit 5. The respondent is the legal representative of the estate of his late father as indicated in the copy of limited grant of letters of administration ad litem (PExhibit 1). This, therefore, fails the test as established in the *Wilson Kazungu Katana case* (*supra*), that the suit land ought to be registered in the name of a person other than the applicant. Essentially, since the respondent owns the suit land jointly with the appellant, he cannot acquire that which he owns by way of adverse possession.
26. Notably, during cross-examination, PW1 stated that it is the appellant's late grandfather who gave them the suit land, land parcel number Kanyada/Kanyabala/1169 and welcomed them onto the same. Clearly, the entry of the respondent's family onto the suit land was with the owner's permission. Therefore, the applicant cannot be heard to claim that his possession and use of the suit land was without the consent of the owner.
27. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
28. In that regard, I find that the respondent who was the plaintiff at the trial court failed to prove his claim on a balance of probabilities.
29. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 25th August 2022 and filed herein on 29th August 2022 hereby succeeds and the orders sought therein are granted accordingly.
30. The respondent to bear the costs of this appeal and the original suit.
31. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF NOVEMBER, 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. The Appellant in person



2. Odhiambo holding brief for G. S. Okoth, Learned Counsel for the Respondent
3. Luanga, Court Assistant

