



**Nyandwaro (Suing as administratrix of the Estate of Moses Atandi  
Ogoti - Deceased) v Monayo & another (Environment & Land Case  
222 of 2013) [2023] KEELC 22437 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 222 OF 2013**

**M SILA, J  
DECEMBER 19, 2023**

**BETWEEN**

**JULIA MORAA NYANDWARO (SUING AS ADMINISTRATRIX OF THE ESTATE  
OF MOSES ATANDI OGOTI - DECEASED) ..... PLAINTIFF**

**AND**

**CHRISTOPHER MYAMWAYA MONAYO ..... 1<sup>ST</sup> DEFENDANT**

**AGNES KEMUMA MOGERE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION AND PLEADINGS**

1. This suit was commenced through an Originating Summons filed on 16 May 2023 which originating summons was amended twice, the final pleading being the further amended originating summons filed on 2 March 2017 seeking the following orders:-
  - (1) That the applicant be declared to have acquired or is entitled by virtue of adverse possession for period of more than 12 years to all that portion of land measuring 2 ½ acres or thereabout as occupied by the applicant out of the land parcel comprising in the title number Wanjare/Bokeire/5612 and the entire Wanjare/Bokeire/5225.
  - (2) An order that the applicant be registered as proprietor of the said portion measuring 0.3 hectares out of land parcel No Wanjare/Bokeire/5612 and the entire land parcel No Wanjare/Bokeire/5225.
  - (2A) in the alternative a declaration do issue to the effect that the registration of parcel numbers Wanjare/Bokeire/ 5224, 5612 and 5225 in the names of the respondents was illegal fraudulent, null and void.



- (2B) An order do issue concerning title numbers Wanjare/Bokeire/5612 and the entire parcel No Wanjare/Bokeire/5225.
- (3) That costs of the summons be provided.
2. The applicant has filed this suit as the administratrix of the estate of the late Moses Atandi Ogoti. The case of the applicant (whom I will henceforth refer to as the plaintiff), as pleaded in the Further Originating Summons and the supporting affidavit filed in support thereof and the affidavits in support of the previous pleadings, is that the subject properties were originally comprised in the land parcel Wanjare/Bokeire/154 (parcel No 154). It is averred that the said land parcel No 154 was registered in the name of the late Zacharia Ondigi Abobo and the late Zablun Abobo as proprietors in common holding a half share each. It is averred that through several homemade agreements Zablun Abobo sold part of the land to Moses Atandi Ogoti (the deceased) and that the last instalment was paid on 9 April 1988 and during this period the applicant was in occupation of the land. The land was however not transferred but the applicant used it for farming. It is averred that on 19 November 1986 the proprietors (Zablun and Zacharia) made an application to transfer a portion of the parcel No 154 to the 1<sup>st</sup> respondent, Christopher Nyamwaya Monayo (hereinafter referred to as the 1<sup>st</sup> defendant) and that this land transferred to the 1<sup>st</sup> defendant came to be registered as Wanjare/Bokeire/2246 measuring 0.5 hectares and that the original proprietors retained the other portion being Wanjare/Bokeire/2245 measuring 2.7 hectares. It is claimed that this was done despite the applicant using the land. It is stated that Zacharia Ondigi died on 4 September 1994 and Zablun Abobo died four years later, on 9 November 1998. It is said that Moses Atandi Ogoti (the plaintiff's husband) subsequently also died on 17 July 2003. The plaintiff states that in January 2013, the 1<sup>st</sup> defendant who had become registered as proprietor of the parcel No 2246, measuring 0.5 Ha, started claiming ownership of the land that the plaintiff had purchased which measured 2 ½ acres and which they had been in possession of since 1984. The plaintiff deposed that she also discovered that a portion of the land purchased by her late husband measuring 0.7 Ha had been registered in name of the 2<sup>nd</sup> respondent, Agnes Kemuma Mogere (hereinafter referred to as the 2<sup>nd</sup> defendant) under the title Wanjare/Bokeire/5225. She has deposed that on 11 August 2013, the 2<sup>nd</sup> defendant entered the land and fenced off this portion of 0.7 Ha and left out a portion measuring 0.3 Ha to the 1<sup>st</sup> defendant located on the parcel Wanjare/Bokeire/5224. She has averred that the parcel No 5224 was subsequently subdivided by the 1<sup>st</sup> defendant, when this case had already been filed, into the land parcels Wanjare/Bokeire/5612 and 5613. She mentions that the 1<sup>st</sup> defendant transferred the parcel No 5613 to one Charles Onyambu Masese and retained the parcel No 5612. She asserts that the 2 ½ acres she claims is partly within the whole of the parcel No 5225 in the name of the 2<sup>nd</sup> defendant and partly within the parcel No 5612 in the name of the 1<sup>st</sup> defendant. The plaintiff claims to have been in possession for more than 12 years peacefully and uninterrupted and has thus acquired title through adverse possession to the whole of the land parcel No 5225 measuring approximately 0.78 Ha and a portion of the land parcel No 5612. She has an alternative claim that the titles of the defendants were acquired fraudulently for failure to undertake succession (presumably of the estate of Zablun and Zacharia Abobo).
3. On 24 May 2013, the 1<sup>st</sup> defendant filed a replying affidavit to oppose the original Originating Summons and also filed replying affidavits to the amended Originating Summons. He deposed that he purchased the land parcel Wanjare/Bokeire/2246 from Zacharia Ondigi Abobo and Zablun Abobo way back in 1986 and since then he enjoyed peaceful, quiet and uninterrupted occupation of the land. He deposed that subsequently both Zacharia and Zablun Abobo sold and transferred to him the remainder portion of the land to him, and he thus acquired registration of the land parcel Wanjare/Bokeire/2245 as well. He averred that he subdivided the parcel No 2245 into the land parcels No 5224 and 5225. He sold the parcel No 5225 to the 2<sup>nd</sup> defendant and asserted that at no time did the plaintiff



have any user or occupation of this portion. He later subdivided the parcel No 5224, which was in his name, into the parcels No 5612 and 5613, and transferred the latter, while retaining the former in his own name. He denied that the plaintiff has been in uninterrupted occupation of his land as alleged. He asserted that the applicant is not in possession of any portion of the disputed land and the suit is frivolous.

4. The 2<sup>nd</sup> defendant relied on the replying affidavit filed by the 1<sup>st</sup> defendant as she signed an authority giving him permission to plead on her behalf. Her position is that she purchased the land parcel No 5225 from the 1<sup>st</sup> defendant.
5. On 24 May 2013, the plaintiff filed an application for injunction, seeking to restrain the defendants from the disputed property. This application was heard by my predecessor, Okong'o J, who dismissed it in a ruling delivered on 7 October 2013. Significantly, the court was not persuaded that the plaintiff had demonstrated what sort of activities she was undertaking on the suit land.
6. On 17 July 2014, directions were taken that the Originating Summons and the supporting affidavit be treated as plaint and the replying affidavit as a defence and the matter to be heard by way of viva voce evidence.
7. In the course of time, the 1<sup>st</sup> defendant died sometimes in February 2020 or thereabouts. There was no substitution and the case against him abated.
8. It is on the above foundation that the matter proceeded for hearing.

## **B. Evidence Of The Parties**

9. The plaintiff testified that she was previously working as a Secretary with a State Corporation until 2007 when she was retrenched and she is now a business lady. She affirmed that she has filed suit on behalf of her late husband. She relied on her witness statement and the supporting affidavits filed in the suit. She elaborated that she has filed suit for adverse possession for land that her late husband purchased, which land measures 2 ½ acres, which her husband bought from Zablon (whom she stated during her testimony to be Zablon Obongo and that his brother was Zakaria Obongo). When asked what title numbers she is claiming, she stated that she is claiming 0.3 Ha from the parcel No 2245 and 0.7 Ha from the parcel No 5225 (this was what she said and there is no error on the numbers the same being in accordance with her evidence). She stated that her husband purchased the land in the year 1984. She then leased it from 1984 and she was being paid rent. She stated that she vacated the land in the year 2013 after she was asked by the Chief to move out and she came to court. She testified that she never fenced the land but that there is trench which shows the boundary. She did not know who was currently in possession of the land. She stated that her husband bought land from the parcel No 2245 and that this land was not subdivided by the original proprietors. She mentioned that it was subsequently subdivided into the parcels No 2246, 2224, and 2225 (again this being the numbers as provided by her when she testified and it is not a typographical error). She also stated that parcel No 2246 is 0.3 Ha, and the parcels No 2224 and 2225 are 0.7 Ha.
10. Cross-examined, she reiterated that it was her late husband who bought the land and she referred to the handwritten agreements attached to her Originating Summons. She acknowledged that the documents do not describe the land being sold. She reiterated that the land was bought in 1984. She stated that they never made any developments on the land and that they just leased it. She had no lease document. She was asked to confirm what land she claims and she was not clear at all (in the same way that she was not clear during her evidence in chief). She mentioned that she claims 0.3 Ha from the 1<sup>st</sup> defendant and 0.7 Ha from the 2<sup>nd</sup> defendant. She wavered by claiming that the land she wants from the 2<sup>nd</sup> defendant is parcel No 5224 and 2224. She later changed this to parcel No 2225. When asked to make her position



specific she settled on parcels No 5224 and 2225. She stated that the 0.7 Ha she claims is combined from the parcels No 5224 and 2225. She testified that she does not know how the 2<sup>nd</sup> defendant got title because the owners had died and no succession was done.

11. With the above evidence, the plaintiff closed her case.
12. Mr. Soire, learned counsel for the defendants, pointed out that the 1<sup>st</sup> defendant had died and he could not trace the 2<sup>nd</sup> defendant. He closed their case without calling any witness.
13. I invited counsel to file submissions, which they did, and I have taken note of these before arriving at my decision.

### **C. Analysis And Disposition**

14. Before I address the issues, I think it is important that I make clear the particular titles of land in issue, and their proprietorship, especially given the rather jumbled up evidence of the plaintiff. The record reflects that Zablou and Zacharia Abobo jointly owned the land parcel Wanjare/Bokeire/154 measuring 3.2 Ha. They obtained registration in their names on 2 August 1976. On 19 March 1986, they effected a correction of their names. On 11 September 1986, this title to parcel No 154 was closed on subdivision resulting in the parcels Wanjare/Bokeire/2245 and 2246. The mutation form, and the application for consent to subdivide, were exhibited. I have seen that upon subdivision, Zablou and Zacharia maintained joint proprietorship of the parcel No 2245 measuring 2.7 Ha, and transferred the parcel No 2246, measuring 0.5 Ha, to the 1<sup>st</sup> defendant. On 14 February 2008, the 1<sup>st</sup> defendant obtained registration of the parcel No 2245 which was hitherto in the name of Zablou and Zacharia. He then proceeded to subdivide it into the parcels No 5224 and 5225 through a mutation form registered on 31 July 2012. The parcel No 5224 measures 2.0 Ha and is still in the name of the 1<sup>st</sup> defendant. The parcel No 5225 was transferred to the 2<sup>nd</sup> defendant on 31 August 2012. There is a further subdivision of the parcel No 5224 which was effected on 22 July 2014 to bring forth the parcels No 5612 (measuring 1.57 Ha) and 5613 (measuring 0.43 Ha). Parcel No 5612 remained in the name of the 1<sup>st</sup> defendant and parcel No 5613 is in name of one Charles Onyambu Masese who is not a party to this case.
15. What the plaintiff alleges is that her late husband purchased land measuring 2 ½ acres from Zablou Abobo, one of the joint registered proprietors of the original land parcel Wanjare/Bokeire/154. She avers that this was through several homemade agreements and that the last instalment was paid on 9 April 1988 at which time her late husband was already in possession. She thus contends that the 12 year period required for one to attain title through adverse possession has lapsed and she is entitled to registration of the land allegedly purchased. She of course testified that she had leased out the land to third parties. She alleges that the land she seeks is comprised in the title No 2245 and the other subdivisions thereto, particularly the subdivisions now registered as No 5612 in name of the 1<sup>st</sup> defendant, and No 5225 in name of the 2<sup>nd</sup> defendant. The plaintiff also questions the manner in which the 1<sup>st</sup> defendant obtained title to the land parcel No 2245, which was initially retained in the names of Zablou and Zakaria Abobo, as they were dead by the time the transfer was effected to the 1<sup>st</sup> defendant and hence she seeks the nullification of the resultant titles thereto which are in the names of the defendants.
16. The case of the plaintiff is hinged on an alleged sale of the land. It is her case that it is through the sales that she and her husband took possession of the land. She has also raised issue about the title of the defendants. In my view, the following issues need interrogation:
  - (i) Whether the plaintiff has proved that she and/or her late husband purchased the land in issue.



- (ii) Whether the plaintiff has proved that she and/or her husband took possession of the suit land and have been in possession for more than 12 years.
- (iii) Whether the plaintiff can maintain a suit for cancellation of the titles of the defendants.

### **Issue 1 – Whether the plaintiff has proved purchase by herself and/or her late husband**

17. When the plaintiff testified, she did not have any original documents relating to any sale agreement. What she relied on were copies that were annexed to her affidavit in support of the Originating Summons for which I cannot vouch their authenticity for her name is not in any of those purported agreements and no witness named in them was called to testify. Nonetheless, I have gone through them. They are nine documents purporting to portray that one Zablon Ohuru Abobo has sold some land to Atandi Ogoti. None of those nine documents mentions the particular land that is being sold. None of those nine documents mentions the size of the land being sold. None of those nine documents mention that a particular size of land is sold from a particular title for a specific amount of money. All I see is mention that Zablon is selling land to Atandi and some payments are made. None of those documents says that a final payment is made for specific land. It is superfluous therefore for the plaintiff to allege that there was a final payment made on 9 April 1988 for the document dated 9 April 1988 does not say that this is a final instalment. In fact, what that document says is that 'bei ya shamba hile ni 4,000/= ' i.e price of the land is Kshs 4,000/= and that Kshs 2,000/= has been paid which would mean that there is a balance of Kshs 2,000/=. I have not been shown any other document indicating payment of a further Kshs 2,000/=. The long and short of it is that I am not persuaded that the plaintiff has proved any specific purchase of land. I repeat: those documents that the plaintiff has displayed do not show what land is being sold; they do not show the size of land being sold; they do not tell the purchase price; they do not provide that full purchase price of a particular amount has been made for sale of a particular size of land from a specific parcel of land. Nowhere in those agreements is it said that the plaintiff and/or her husband have purchased 2 ½ acres of land from the title Wanjare/Bokeire/154.
18. The failure to indicate the land being sold in the documents displayed by the plaintiff is important because it cannot be argued that the suit land had no description in the 1980s. It had already been adjudicated and registered in name of Zablon and Zacharia way back in 1976. If it was actually part of the land parcel No 154 being sold, why is it that the description of the land is not given in the documents ? No explanation was offered by the plaintiff as to why the documents she has produced alleging that the suit land was sold to her husband do not have the parcel number alleged to be subject of the sale.
19. Apart from failure to describe the land being sold, if it is the case of the plaintiff that her husband had paid for the land, you would expect that Zablon and Zacharia would consider this when they were subdividing their land in 1986. All that Zablon and Zacharia did was subdivide their land into two portions, and shortly after the subdivision, they transferred the title No 2246, measuring 0.5 Ha to the 1<sup>st</sup> defendant. Nowhere is the plaintiff or her husband factored in the said subdivision. Moreover, part of the plaintiff's case, according to her documents, would mean that the suit land or part of it, was sold after 1986 for among the nine documents said to encompass the sale agreement documents are documents dated 8 March 1988, and two dated 9 April 1988. By this time, the land had already been subdivided and if full payment had been made, you would expect the parties to proceed to the Land Control Board. It was not explained why they did not go to the Land Control Board, either before 1986 during the subdivision of the land parcel No 154, or after 1988, if full payment had been made as alleged. Certainly, the evidence does show that Zablon and Zacharia had no problem subdividing and transferring land to a person that they had sold land to if the example of the 1<sup>st</sup> defendant is to be considered. Without there being an explanation from the plaintiff, why Zablon and Zacharia did



not consider transferring part of the land parcel No 154 to the plaintiff and/or her husband, and without there being any indication of the particular land and size in the nine documents produced by the plaintiff, this court cannot arrive at the conclusion that the plaintiff has proved that her husband purchased 2 ½ acres, or indeed any portion of land, from the land parcel Wanjare/Bokeire/154. In other words, the plaintiff has failed to prove that she and/or her late husband purchased land that is currently comprised in the titles Wanjare/Bokeire/5612 and/or Wanjare/Bokeire/5225 as alleged.

### **Issue 2 – Has the plaintiff proved possession of the suit land ?**

20. The evidence of the plaintiff when she testified in court is not very helpful to her as to what land she is in possession of. She had great difficulties stating exactly what land she claims and from which particular title. She eventually settled at the parcels No 5224 and 2225. We do not have any parcel of land herein which bears the number 2225. I wonder how one comes to court on a case for adverse possession and is not even sure of the titles that the land she claims is comprised in. But let us assume that what the plaintiff claims is a portion of the parcel No 5612 (subdivision of parcel No 5224) in name of the 1<sup>st</sup> defendant and the whole of parcel No 5225 in name of the 2<sup>nd</sup> defendant. Has she proved that her husband or herself were ever in possession of the land comprised in these two titles ? I am afraid that she has not.
21. First, the plaintiff never came with any ground report to demonstrate what on the ground she is claiming to have been in possession of. It is only her word of mouth, backed and supported by completely nothing else, that she has been in possession of the whole of the land owned by the 2<sup>nd</sup> defendant (parcel No 5225) and part of the land parcel No 5612. A ground report to demonstrate the possession of the plaintiff would certainly have been useful but the plaintiff brought none.
22. Secondly, other than herself, the plaintiff brought no other witness to corroborate her claim that she and her husband were ever in possession of the land that she claims. It would appear to me that the land is in a rural area. Surely, the Assistant Chief, Chief, or a neighbour, could have vouched for any possession that the plaintiff had, if at all. No such person/s was called to support the allegation that the plaintiff and her husband were ever in possession. Given the denial of the defendants, that the plaintiff has never been in possession as alleged, the plaintiff needed to prove her possession, which I am afraid she has not done so to the required standard. In her evidence, the plaintiff claimed to have leased the land but she never produced any lease agreement and thus we have nothing in writing to show that she ever leased part of the land. Even the alleged lessee was a no show.
23. It will be recalled that the plaintiff was completely off radar on the particular title that she seeks and that she couldn't tell the parcel numbers and did not even appear to know them. This simply means that the plaintiff does not properly know the land, and this does not do her case any good. You cannot come to court alleging adverse possession when you cannot be precise in your evidence on what title you are claiming. Clearly, the evidence of the plaintiff on possession is so scanty and bare that this court cannot come to the conclusion that the plaintiff has proved any possession, at any time, of the suit land. Having failed to prove possession, there is no way she can get judgment in her favour for adverse possession of the suit land. Her case for adverse possession falls flat for failing to prove purchase and possession after purchase.

### **Issue 3 – Can the plaintiff sustain a case for fraudulent title ?**

24. The plaintiff has pleaded in the alternative that the defendants obtained title by way of fraud. She has questioned how the 1<sup>st</sup> defendant obtained title to the land parcel No 2245, which remained in the name of Zablou and Zacharia, after the original proprietors had subdivided the land parcel No 154. The plaintiff cannot sustain a case of fraud against the 1<sup>st</sup> defendant for the 1<sup>st</sup> defendant is dead and



no substitution was done. Her case that the 1<sup>st</sup> defendant fraudulently procured title to the parcel No 2245, and the resultant titles No 5224 and 5225, or any subdivision thereof, including parcel No 5612, is dead on arrival and this court cannot interrogate that. As to the other parcel No 5225 in name of the 2<sup>nd</sup> defendant, I have seen no evidence that she acquired the title through fraud.

25. Whatever the case, the plaintiff does not even have locus standi to question the transfer of the land parcel No 2245 from Zablou and Zacharia, to the 1<sup>st</sup> defendant. Such case can only be mounted by a person holding a grant of letters of administration for the estate of Zablou and Zacharia of which the plaintiff does not hold. What she possesses is only letters of administration for the estate of her late husband and at no point was her late husband ever registered as proprietor of the suit land.
26. Thus, not only does the plaintiff have no *locus standi* to sue on behalf of the estate of Zablou and Zacharia, she has also failed to prove any fraud against the 2<sup>nd</sup> defendant, who is the only surviving party, given that the 1<sup>st</sup> defendant is deceased.
27. I have addressed all the three issues which I thought important in this case. All the issues have been answered in a manner that is negative to the plaintiff. What this means is that the plaintiff has failed to discharge the burden of proof despite the surviving defendant not offering any evidence. The result is that the plaintiff's Originating Summons is dismissed with costs to the 2<sup>nd</sup> defendant. I make no orders on costs for or against the 1<sup>st</sup> defendant as his suit was marked abated.
28. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 19 DAY OF DECEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

In the presence of:

Ms. Nyaenya instructed by M/S Bosire Gichana & Co. Advocates for the plaintiff

Mr. Soire for the defendants

Court Assistant – Lawrence Chomba

