



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Owuor v Shikuku (Sued as the Administrator and Personal Representative  
of the Estate of Remjus Nyangoro Ila) (Environment and Land Appeal  
E030 of 2022) [2023] KEELC 22234 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22234 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E030 OF 2022  
E ASATI, J  
DECEMBER 14, 2023**

**BETWEEN**

**MATTHEW JUSTUS OWUOR ..... APPELLANT**

**AND**

**JEREMIAH OCHIENG SHIKUKU (SUED AS THE ADMINISTRATOR AND  
PERSONAL REPRESENTATIVE OF THE ESTATE OF REMJUS NYANGORO  
ILA) ..... RESPONDENT**

*(Being an appeal from the judgement and decree of Principal Magistrate at Tamu delivered  
by Hon. A.K. Makoross on 31<sup>st</sup> May, 2022 in Tamu ELC Case No.E022 of 2021)*

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 30<sup>th</sup> June, 2022, the appellant MATHEW JUSTUS OWUOR, appealed against the judgement of Hon. A.K. Makoross dated 31<sup>st</sup> May, 2022 in Tamu ELC Case No. E022 of 2021(the suit) and sought for orders against the Respondent JEREMIAH OCHIENG SHIKUKU on behalf of the estate of REMJUS NYANGORO ILA, deceased that;
  - a. The appeal be allowed.
  - b. The judgement of Hon. A.K. Makoross delivered on 31<sup>st</sup> Day of May, 2022 against the appellant and all the consequential orders emanating therefrom be set aside and substituted thereat with an order allowing the appellant's prayers in the plaint in lower/trial court.
  - c. That the appellant be granted the costs of this appeal and the cost in the lower/trial court.
2. The record shows that the appellant was the plaintiff in the suit wherein he had sued the Defendant (Respondent herein) vide the plaint dated 21<sup>st</sup> October, 2021 over land parcels known as SIDHO E/2127, 2157 and 1045 (the suit lands herein). The record further shows that the court heard the suit



and vide its judgement dated 31<sup>st</sup> May, 2022 found that the appellant had not proved his claim on a balance of probabilities and dismissed the suit with costs.

3. Direction were given on 28/3/2023 that the appeal be argued by way of written submissions. In compliance, written submissions dated 4<sup>th</sup> October, 2023 were filed on behalf of the appellant by the firm of Nyang'acha & Associates Advocates. Similarly, written submissions dated 24<sup>th</sup> July, 2023 were filed on behalf of the Respondent by the firm of Tawo & Company Advocates.

### **Issues for Determination**

4. The grounds of appeal as contained in the Memorandum of Appeal are that;
  - a. The learned trial magistrate erred in law in holding that the appellant had not proved that he is the registered and/or beneficial owner of the land parcel title numbers KISUMU/SIDHO EAST/2127, 2157 and 1045 despite the overwhelming and uncontroverted evidence proving that the appellant is the owner of the aforesaid properties.
  - b. That the learned magistrate erred in law and fact in failing to allow the appellant's alternative prayers that he's entitled to the title and ownership of the land parcel title number KISUMU/SIDHO EAST/2127 and 1045 by virtue of the doctrine of adverse possession yet the appellant had proved all the ingredients of adverse possession.
  - c. That the learned magistrate erred in fact and law by failing to evaluate the evidence on record together with the submissions and the cited authorities which clearly pointed out that the appellant had proved her claim as pleaded in the plaint.

### **Analysis and Determination**

5. This is a first appeal. The court has an obligation to re-examine the evidence placed before the trial court.
6. The first issue for determination as contained in the first ground of appeal is whether or not the trial court erred both in law and fact in holding that the appellant had not proved that he is the registered and/or beneficial owner of the suit land.

The appellant had pleaded in paragraphs 3 and 4 of the plaint that on or about 19<sup>th</sup> September, 1980, he had purchased the suit lands all measuring 2.5 acres from the deceased at the sum of Kshs.3,070/- which amount was paid in full. That thereafter the appellant took possession of the suit lands which possession he still had.

7. The record shows that the appellant's evidence comprised of his testimony and the documents he produced as exhibits. The appellant testified as PW1. He adopted his witness statement dated 21<sup>st</sup> October, 2021 as his evidence in chief. The witness statement contained the same averments as the plaint. The appellant produced agreement dated 19<sup>th</sup> September, 1980, Land Control Board application for consent forms, transfer form, pleadings and ruling in Nyando Succession Cause No.244/2019, agreement to lease land dated 6<sup>th</sup> June, 2001, caution form and Affidavit sworn on 19<sup>th</sup> September, 1980 as exhibits in the case.
8. The record shows further that the Respondent denied the appellant's claim vide his defence dated 24<sup>th</sup> November, 2021. He described the appellant as a mere busy body without any interest or concern. He urged the court to dismiss the case. He testified in court as DW1 and adopted the contents of his witness statement dated 28<sup>th</sup> November, 2021 as his evidence in chief. He stated in the witness statement that prior to his death, the deceased, REMJUS NYANGORO ILA, was the registered owner of the suit



lands. That the deceased never entered into agreement for sale of the suit lands with the plaintiff or anybody else. That it was strange how the plaintiff could have bought land in 1980 and fail to take steps towards registering the same in his name until 12<sup>th</sup> March, 1980 when the deceased died.

9. The record shows that the trial court after hearing the evidence and considering the submissions placed before him, found that;

“on the first issue, whether the plaintiff demonstrated that he is the registered owner to the suit properties, I would succinctly rule that he is not ..... the plaintiff relies on an agreement purportedly made in 1980. There is no further evidence to show that the plaintiff followed due process thereafter to have the suit properties legally transferred to his name.”

10. In this appeal, the appellant faults the trial court for this finding and contends that the court erred in the said finding despite the overwhelming and uncontroverted evidence proving that the appellant is the owner of the suit lands. It was submitted on behalf of the appellant that by reason of the documents produced by the appellant in evidence the appellant proved ownership of the suit land. Counsel relied on the case of *Abere –vs- Ondieki (Civil Appeal 09 of 2019) [2022] KELC 14600 (KLR) (3 November 2022)* where it was held that failure to obtain consent of the Land Control Board does not invalidate the transaction. Counsel also relied on the case of *Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR* and the case of *Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri [2014] eKLR* on constructive trust. Counsel urged the court if not for anything, then for the proprietary estoppel and or trust to give effect to the intention of the parties by allowing the plaintiff’s claim. That any contrary holding would be to unjustifiably enrich the estate of the deceased and the Respondent.

11. Ownership of land is demonstrated by possession of documents of ownership of that land. Apart from the land sale agreement produced by the appellant, there is no other document among the documents he produced appellant that relates to ownership of the suit lands.

The land sale agreement was disowned by the Respondent.

There was no evidence adduced by the appellant that the sale transaction was ever completed and the land transferred to his name.

As at the date of his death, the suit lands were still in the name of the deceased.

12. I find that on the basis of the evidence placed before it, the trial court was justified to find that the appellant did not prove that he was the registered owner of the suit land. Ground 1 of the appeal therefore fails.

13. The next issue for determination as contained in ground 2 of the appeal is whether or not the trial Magistrate erred in failing to allow the appellant’s alternative prayer that he is entitled to title to and ownership of the suit land by virtue of the doctrine of adverse possession.

Regarding this, the appellant pleaded in the plaint that after purchase of the suit land, he took possession thereof and continued to use the suit lands peacefully, continuously, openly and to the exclusion of all and including the deceased and the deceased heirs. In his evidence in court, he stated vide his witness statement dated 21<sup>st</sup> October, 2021 that he has been occupying the suit land for a period of more than 40 years adverse to the interest of the owner and that he is now entitled to the suit lands by virtue of the legal doctrine of adverse possession.

14. The Respondent in his defence denied that the appellant has ever had occupation of the suit land. In his evidence in court vide his witness statement he stated that the appellant was a stranger to him and



has never had possession of the suit land or any particular portion thereof. That he (Respondent) was the one currently enjoying quiet possession of the suit property and cultivating the same peacefully.

15. On the issue of adverse possession, the trial court made a finding that the Plaintiff had been unable to establish active possession and that the Defendant had sufficiently demonstrated that he is in occupation of the suit lands.
16. In this appeal, the appellant faulted the trial court for this finding and submitted that the appellant had testified that he had over time leased the lands to one Gideon Ogutu Opuko and the he produced the lease agreement which according to him, affirms that he has been in occupation and continues to use the suit lands as he could not lease what he was not using. Counsel relied on the case of Mtana Lewa – vs- Kahindi Ngala Mwangandi [2015] eKLR and Section 7, 13, 37 and 38 of the Limitation of Actions Act to support the claim of adverse possession.
17. Regarding the lease agreement produced by the appellant to prove possession of the suit lands, the trial court observed that though there was such lease agreement, there was no evidence that the lessee did take actual possession of the suit lands. I agree with the trial court that the lifeline of a claim based on adverse possession is proof of actual possession of the suit land. No evidence was tendered to prove this. The appellant claimed that the suit lands were used to cultivate sugarcane. However, there was no evidence in terms of photographs to show the activities on the suit land; a surveyor’s report to demonstrate that the activities are on the suit land and evidence that the activities are being carried out by the appellant or his tenant.  
  
The trial court was therefore justified to find that the claim based on adverse possession had not been proved.
18. The last issue for determination as contained in the third ground of appeal is whether or not the trial court failed to evaluate the evidence on record together with the submissions made and the authorities cited by the appellant. It has not been demonstrated in this appeal what aspects of the evidence and submissions were not evaluated or were omitted from the judgement and whether miscarriage of justice was occasioned thereby to the appellant. The record shows that the trial court evaluated the evidence and took into account the submissions made by the parties in arriving at its decision.
19. Having determined that all the 3 grounds of appeal have not been proved, I find that the appeal lacks merit. The appeal is hereby dismissed. Costs to the Respondent.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

---

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.

No Appearance for the Appellant.

Tawo present for the Respondent.

