



**Were (Suing as the personal representative and administratrix of the estate of Paul Were Ogutu - Deceased) v Odera; Crosslcy Holdings Ltd (Interested Party) (Environment and Land Appeal 38 of 2022) [2023] KEELC 22361 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22361 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIRONMENT AND LAND APPEAL 38 OF 2022**  
**E ASATI, J**  
**DECEMBER 14, 2023**

**BETWEEN**

**AGNETA ANYANGO WERE ..... APPELLANT**  
**SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATRIX OF**  
**THE ESTATE OF PAUL WERE OGUTU - DECEASED**

**AND**

**NOAH ODERA ..... RESPONDENT**

**AND**

**CROSSLCY HOLDINGS LTD ..... INTERESTED PARTY**

*(Being an appeal from the decision of Hon. E.A. Obina (PM) in KISUMU  
CMC ELC SUIT NO.100/2021 delivered on 29th December, 2022)*

**JUDGMENT**

1. The record of appeal shows that the appellant was the plaintiff in Kisumu CMC Environment and Land Case No.100 of 2021 (the suit). The appellant in her capacity as the personal representative of and administratrix of the estate of PAUL WERE OGUTU (the deceased) sued the Respondent vide the amended plaint dated 16<sup>th</sup> August, 2021 for orders of eviction, general damages, permanent injunction and costs.
2. The appellant's case was that at all material times the deceased was and still is the registered proprietor of land parcel number KISUMU/KASULE/3406 – (the suit land). That the Respondent forcefully took up possession of part of the suit land and proceeded to illegally put up a house thereon before the estate of the deceased was fully administered. The plaintiff therefore sought the intervention of the court.



3. The record further shows that in response to the appellant's case, the Respondent filed a statement of Defence and counterclaim dated 6<sup>th</sup> October, 2021 denying the appellants claim and vide the counterclaim, the Respondent claimed half(1/2) of the suit land on the basis of a purchase and prayed for a declaration that the rights of the registered owner to the portion of measuring ½ of the land were extinguished by virtue of Section 7 of the Limitation of Actions Act and that the Respondent had acquired title by adverse possession, orders of transfer, prohibition permanent injunction and costs.
4. The case was heard by the trial court which vide its judgement dated 29<sup>th</sup> September, 2022 found that the Plaintiff had failed to prove her case against the defendant on the required standards on a balance of probabilities. The trial court dismissed the suit and allowed the counter claim.
5. Dissatisfied with the judgement, the appellant preferred the present appeal vide the Memorandum of Appeal dated 17<sup>th</sup> October, 2022 and sought that the appeal be allowed and the judgement of the lower court be set aside and be substituted by the prayers in the plaint.
6. The appeal was canvassed by way of written submissions. The written submissions were filed on behalf of the appellant by the firm of D.E.O. Anyul & Company Advocates Similarly written submissions dated 3<sup>rd</sup> October, 2023 were filed on behalf of the Respondent.

### **Issued for Determination**

7. The ground of appeal as contained in the memorandum of appeal are:-
  - a. The Honourable Trial Magistrate erred in law and fact by dismissing the appellant's suit and thereafter entering judgement in favour of the respondent in the counter-claim on the basis that the respondent had acquired interest in the subject land parcel No.Kisumu/Kasule/3406 as an Adverse Possessor whereas the respondent herein did not lodge in Court an Originating Summons upon which a claim of Adverse Possession can be hinged.
  - b. The Honourable Trial Magistrate erred in law and fact by holding that the interest of the beneficiaries of the estate of the deceased registered proprietor of land parcel No.Kisumu/Kasule/3406, Paul Were Ogotu (deceased) had been ascertained and determined even before taking out Grant of Letters of Administration.
  - c. The Honourable Trial Magistrate erred in law and fact by failing to appreciate that the appellant had demonstrated that one Leonida Achieng Were (also deceased) was not the registered proprietor of land parcel No. Kisumu/Kasule/3406 as at the time both the respondent and the said Leonida Achieng Were transacted on the said title.
  - d. The Honourable Trial Magistrate erred in law and in fact by failing to appreciate the fact that both the respondent and the said Leonida Achieng Were were voluntary and conscious intermeddles of the estate of the late Paul Were Ogotu and therefore cannot derive from the Court any beneficial judgment in favour of the Respondent as is itemized in the Counter-Claim
  - e. The Honourable Trial Magistrate erred in law and fact by holding that an intermeddler, the respondent herein, acquired registerable rights against the estate of the deceased post-humus and to which holding has occasioned to the appellant and to the entire estate of Paul Were Ogotu a serious miscarriage of justice.
  - f. The Honourable Trial Magistrate erred in law by failing to appreciate that the Grant of Representation of an estate of a deceased person takes effect upon the issuance of Grant of



Letters of Administration and any disposal of immovable property must be done upon and after issuance of Certificate of Confirmation of Grant hence there is a serious miscarriage of justice which has disinherited the beneficiaries of the estate of Paul Were Ogutu.

- g. The Honourable Trial Magistrate erred in law and fact by failing to find that the appellant had established a good case and proved her claim on a balance of probability and was therefore entitled to the judgement enlisted in the suit in the Court below.
8. Though there are seven grounds of appeal as listed hereinabove, the appellant framed the issues for determination to whether the Respondent's contract of sale before the issuance of a confirmed Grant of Letters of Administration in respect of the estate of Paul Were Ogutu – deceased was in contravention of Section 45 of the Law of Succession Act and amounted to intermeddling with the estate of the deceased and whether the Respondent had acquired interest in the suit parcel as an adverse possessor.

These are the issues for determination herein.

### **Analysis and Determination**

9. The first issue for determination is whether the Respondent's contract of sale before the issuance of confirmed Grant of Letters of Administration in respect of the estate of Paul Were Ogutu was in contravention of Section 45 of the Law of Succession Act and amounted to intermeddling with the estate of the deceased.
10. The Respondent pleaded in paragraphs 3(i) of the Defence that by an agreement for sale dated 12<sup>th</sup> March, 2007 the Plaintiff's co-wife one LEONIDA ACHIENG WERE (the Vendor) now deceased, entered into a contractual arrangement for sale of a part/portion measuring half (½) of the suit property to the Defendant for a purchase price of Kshs.200,000/- in which agreement the Vendor described herself as the proprietor of the suit property.
- In his evidence in court, the Defendant narrated how he bought the land. He stated that the land was then in the Vendor's husband's name but that that was not brought to his attention.
- DW.2 also testified and narrated how the agreement was entered into and signed in an Advocate's office.
11. The appellant in her reply to defence and defence to counterclaim, denied the sale agreement and reiterated that the Respondent forcefully took possession of part of the suit land thereby intermeddling with the estate of Paul Were Ogutu – deceased.
- She further pleaded that there has been no transaction between her as the administratrix of the estate of Paul Were Ogutu in respect of the suit land.
12. The appellant on cross-examination stated that she does not know whether Leonidah had an agreement with the Respondent. That the land was still in her husband's name.
13. It was submitted on behalf of the appellant that the mere fact that the Vendor was one of the surviving spouses of the deceased did not make her a personal representative of the deceased. That the Grant of Letters of Administration to the estate of the deceased was issued to the appellant on 16<sup>th</sup> February, 2021 and confirmed on 16<sup>th</sup> August, 2021. That under Section 80 of the Act, a Grant of Letters of Administration is effective from the date of issue and does not apply retrospectively. That hence any transaction entered into with a person who is yet to be appointed administrator over the estate assets is null and void since such assets would not have vested in such a person, and that such a person would have no standing in law to transact over such property. That the effect of Section 45 of the Law of Succession Act is that the property of a dead person cannot be lawfully dealt with unless such a person



is authorized to do so by the law. That any person who handles estate property without authority is guilty of intermeddling.

14. Counsel submitted further that the Vendor did not have power as per Section 82(b)(ii) of the [Law of Succession Act](#) that prohibits the sale of the immovable property of the deceased before confirmation of Grant. That the vendor had nothing to sell and that the Respondent bought nothing from her. That this court has no capacity to sanitize the sale and no order of specific performance can emanate from it.
15. The Respondent on the other hand submitted that the Respondent never illegally possessed part of the suit property. That he bought the land vide the land sale agreement exhibited. That he took possession of the land and remained in possession since 12<sup>th</sup> March, 2007.
16. I have considered the pleadings, evidence and submissions on this issue. It is not disputed by the Respondent that the sale agreement was done when the registered owner of the land to be sold was already deceased. It was admitted that the seller had not taken out Letters of Administration in respect of the estate of the deceased registered owner.

The Respondent stated that he did not know at the time of purchase that the land was registered in the name of the deceased. He did not conduct a search to ascertain ownership of the land he was buying. He testified that he only learnt after the purchase that the land was registered in the name of the deceased.

Under Section 45 of the [Law of Succession Act](#), dealing with asset of a deceased person before Grant of Letters of Administration amounts to intermeddling which is a criminal offence.

17. The trial court on this issue held that the deceased co-wife was a beneficiary to her husband's estate. That a beneficiary can sell his/her portion of inheritance.
18. I respectively find that the finding of the trial court on this issue was erroneous in view of the provisions of Section 2, 45, 80 and 82 of the [Law of Succession Act](#). No person, whatever the relationship the person may have had with the deceased, has capacity to transact in the property of the deceased until such person is appointed as a personal representative or administrator of the estate of the deceased in accordance with the provisions of the [Law of Succession Act](#).
19. The next issue is whether the Respondent had acquired interest in the suit parcel as an adverse possessor.

The Respondent pleaded that after purchase of the land, he took possession thereof on 13<sup>th</sup> March, 2007, constructed a house and occupied it in the same year and has since had quite, open, continuous and exclusive possession of the sold portion which is half (½) of the suit land. DW.2 testified that soon after purchase of the land, they were excited, they constructed a house thereon and occupied it.

20. The appellant's case was that the Respondent forcefully entered the suit land which was still in the name of the deceased and built a house and occupied it.
21. It has been submitted in this appeal on behalf of the Respondent that the Respondent's entry onto and occupation of the suit land amounts to adverse possession. Counsel relied on the case of Karuntimi Raiji –vs- M'makinya M'itunga Civil Appeal No.325 of 2009 at Nyeri where it was held that under Section 2(1) of the Law Reforms Act all causes of action subsisting against or vested in a deceased person shall survive against or as the case may be for the benefit of his estate.

On the ingredients of adverse possession, Counsel relied on the case of Mary Wangari Macharia –vs- Edwin Onesmus Wanjau among others and submitted that the applicant's claim for adverse possession had been proved. That adverse possession rights are equitable rights which are binding on the land.



22. It was submitted on behalf of the appellant that having learnt that the sale agreement had been frustrated, the only remedy available to the Respondent lay in suing the vendor or her estate to either recover the land that she sold to him or for refund of the consideration. That the Respondent did not file an Originating Summons in terms of Order 37 Rule 7 Civil Procedure Rules and Section 38 of the *Limitation of Actions Act*. That the learned trial magistrate erred in directing that the Respondent is an adverse possessor and that he be registered as the proprietor of the suit parcel as such orders could only flow from a suit commenced by way of Originating Summons. Counsel relied on the case of Leonard Kiplangat & Another –vs- Samuel Rotich & 9 Others [2018]eKLR.
23. It is clear from the evidence that as at the time of the Respondent’s entry onto the suit land, the registered owner was deceased. The vendor had no proprietary rights over the suit land as the estate of the deceased was yet to be succeeded. Adverse possession entails the running of time against the interest of the registered owner who has failed to assert his title and remove a trespass or a person in adverse possession from the land. As at the time of the alleged purchase and entry onto the suit land, there was no person with capacity to transact in the suit land and against whose title and interest to the suit land time for purposes of adverse possession would run.
24. It was therefore erroneous to find that adverse possession had been proved in the circumstances.
25. On the basis of this court’s determination of the two issues herein, I find that the appeal has merit and allow it as follows;
- a. The judgement of the lower court is hereby set aside and substituted with judgement dismissing the counter-claim and allowing the plaintiff’s claim in terms of prayers (a), (c) and (d) of the plaint.
  - b. Costs of the appeal to the appellant.
- 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.

Arika for the Respondent.

