



Ajwang (Suing as the Legal Representative of the Estate of James Ajwang Odiyo- Deceased) v Atieno & another (Sued as the Legal Administratrix of Jacob Kirito Omollo- Deceased) (Environment & Land Case 50 of 2021) [2023] KEELC 22050 (KLR) (5 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 50 OF 2021**

**GMA ONGONDO, J
DECEMBER 5, 2023**

BETWEEN

EDWARD ONYANGO AJWANG (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES AJWANG ODIYO- DECEASED) PLAINTIFF

AND

**MILKA ADHIAMBO ODOYO 1ST DEFENDANT
KERINA ATIENO 2ND DEFENDANT
SUED AS THE LEGAL ADMINISTRATRIX OF JACOB KIRITO OMOLLO-
DECEASED**

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Kasipul/Kamuma/434 measuring approximately zero decimal four four hectares (0.44 Ha) in area (The suit land herein). The same is located in Kasipul Sub County within Homa Bay County.
2. The plaintiff is represented by M/s Oguttu Mboya, Ochwal and Partners Advocates.
3. The defendants are represented by M/s J. O. Otieno and Company Advocates.
4. In the first instance, the plaintiff was James Ajwang' Odiyo (deceased 1) but he died on 3rd October 2018. He was substituted by Edward Onyango Ajwang, who obtained a grant of letters ad litem to his estate on 31st October 2019.



5. The original defendant was Jacob Kirito Omollo (deceased 2 herein) who was sued in his capacity as the legal administrator of the estate of Omollo Nyakado (deceased 3). Following his demise on 28th July 2015, he was substituted by the defendants, who obtained a grant of letters of administration intestate of his estate on 19th December 2016.
6. Initially, this matter had been filed at Kisii Environment and Land Court before being transferred to Migori Environment and Land Court. On 27th October 2021, it was further transferred to this court, upon its establishment, for hearing and determination in the spirit of Articles 50 and 48 of the Constitution of Kenya, 2010.

summary of the Parties' Respective Cases

7. The plaintiff instituted the suit by way of an amended originating summons dated 3rd April 2017 and filed herein on 20th April 2017. The same was brought pursuant to Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 and Section 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
8. The plaintiff has sought the orders infra:
 - a) A declaration that the defendants' rights to recover the suit land is barred under the Limitation of Actions Act (*supra*) and their title, together with that of the predecessor, now deceased, thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 36 years.
 - b) That there be an order that the plaintiff be registered as the proprietor of the whole of the suit land, in place of the defendants and/or the deceased, who currently holds the title of the suit land.
 - c) That there be an order restraining the defendants by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit land, in any manner whatsoever and/or howsoever.
 - d) The Deputy Registrar and/or the Executive Officer of the honourable high court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the suit land in favour of the plaintiff, in the event of default by the defendants to execute the necessary transfer instruments.
 - e) Costs of this originating summons be borne by the defendants.
 - f) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
9. The originating summons is anchored on a fourteen (14) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto together with copies of a land sale agreement, a copy of charge sheet in Oyugis Law Courts Criminal Case No. 33 of 2010 as well as copies of the green card and official search certificate of the suit land.
10. Briefly, the plaintiff's contention is that on 14th April 1971, deceased 1 entered into a sale of land agreement with deceased 3, for the purchase of the suit land. That he took possession of the suit land and cultivated the same until on or about 19th January 2010, when deceased 2 started laying claim to the suit land and caused him to be arrested and charged with the offence of trespass in Oyugis Law Courts Criminal Case No. 33 of 2010. That later, deceased 2 took out a grant of letters of administration to the estate of deceased 3 and caused the suit land to be transferred to himself on 9th December 2008.



The plaintiff averred that at the time of transfer, deceased 1 had been in occupation of the suit land since 1971, a period in excess of 36 years. That therefore, the rights of both deceased 2 and 3 over the suit land have been extinguished by effluxion of time.

11. In his testimony, the plaintiff, Edward Onyango Ojwang (PW1), relied on the amended originating summons dated 3rd April 2017 and supporting affidavit sworn on even date, as well as a supplementary bundle of documents serial numbers 1 to 10 annexed thereto (PExhibits 1 to 10), which were adopted as part of his evidence. He stated that he has been in possession of the suit land for 30 years, the same having been purchased by his father, deceased 1. That he cultivates it.
12. In cross-examination, PW1 stated that the suit land was purchased at a cost of Kshs. 600 to Kshs. 670 but later clarified that the purchase price was indeed Kshs. 300 as indicated in the sale agreement (PExhibit 5 and 6). That deceased 1 paid a deposit of Kshs 120 as per PExhibit 6. He could not confirm whether the balance of the purchase price was paid. He admitted that the sale agreements (PExhibits 5 and 6) do not indicate the land reference number of the property being sold.
13. Isaac Akeyo Odiyo, PW2, adopted his statement dated 13th May 2023 as part of his evidence. He testified that he was present during the sale of the suit land between deceased 1 and 3. That deceased 1 started cultivating maize on the suit land after paying the entire purchase price for the same.
14. During cross-examination, he stated that he attested to the execution of PExhibit 5. That however, he did not read the contents thereof.
15. The defendants opposed the suit vide a statement sworn on 10th July 2014 by Jacob Kirito Omollo (deceased 2) and duly lodged herein on 15th July 2014, wherein he urged the court to dismiss the claim.
16. DW1, Kerina Atieno Kirito, relied on the witness statement of deceased 2 dated 10th May 2014, which was adopted as part of her evidence in chief and a list of documents of even date (DExhibits 1 to 6). She testified that after the death of deceased 2, she obtained a grant of letters of administration to his estate and transferred the suit land to herself and subsequently to her children. She averred that she has been utilizing the suit land since 1989. That she cultivates sugarcane, maize, millet and eucalyptus thereon. She averred that the plaintiff has never utilized the suit land.
17. On cross-examination, she stated that she was not aware of any sale agreement entered into for the sale of the suit land. That she did not obtain a court order to stop the family of the plaintiff from cultivating the suit land.
18. DW2, Thomas Gat Omondi, relied on his witness statement dated 31st May 2023. During cross-examination, he stated that the plaintiff's family has never used the suit land. That the person who cultivates the same is unknown to him but that DW1 also used to cultivate it.
19. DW3, Milka Adhiambo Odoyo, relied on the statement of deceased 2 dated 10th May 2014, which was adopted as part of her evidence in chief. She associated herself with the testimonies of DW1 and 2. On cross-examination, she admitted that she was not conversant with PExhibits 5 and 6 and stated that:

“ ... I do not know who uses the suit land...”
20. Thereafter, the plaintiff's counsel filed submissions dated 21st July 2023 13th December 2022 on 15th December 2022 and identified three issues for determination, to wit, whether the plaintiff herein entered into a lawful land sale agreement and if so, whether the plaintiff's occupation in respect of the suit property became adverse upon lapse of six months from the date of execution of the land sale agreement; whether the plaintiff's occupation and/or use of the suit property has been open, continuous and uninterrupted and if so, the duration of the occupation and whether the plaintiff's



occupation and/or possession of the suit property meets the threshold for declaration of adverse possession.

21. Counsel submitted that the suit land was initially registered in the name of deceased 1. That the plaintiff's occupation of the same became adverse to the rights of the registered owner upon expiry of six months from the date of execution of PExhibits 5 and 6. That thus, the statutory 12 year period for adverse possession accrued in April 1983. That the plaintiff's occupation of the suit land has been open, continuous and uninterrupted as evidenced by the maize plantation and trees planted thereon. That deceased 1 did not take out any proceedings to obtain vacant possession of the suit land. That further, the transfer and registration of the suit land as disclosed by DW1, does not avert the application of the doctrine of adverse possession. He relied on various authorities including the case of [*Rhoda Mongina Ondoro and 2 others –vs- Johnstone Nyanyuki Menge*](#) (2019) eKLR, to fortify the submissions.
22. Learned counsel for the defendants did not file any submissions herein.

Issues for Determination

23. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See [*Galaxy Paints Co Ltd-vs-Falcon Grounds Ltd*](#) (2000) 2 EA 385 and Order 15 of the [*Civil Procedure Rules*](#), 2010.
24. I have duly considered the amended originating summons, the statement by deceased 2, the testimonies of PW1 and PW2 and the plaintiff's submissions as well as the testimonies of DW1, DW2 and DW3 So, the issues for determination are as captured in the case of [*Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Baksbein and another*](#) (2015) eKLR 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.

Discussion and Determination

25. It must be noted that the plaintiffs' claim is for the whole of land reference number Kasipul/Kamuma/434 measuring approximately zero decimal four four hectares (0.44 Ha) in area, the suit land herein. Therefore, the plaintiff's claim is over definite portions of land; see [*Mutbuita –vs- Wanoe & 2 others*](#) (2008) 1KLR (G&F) 1024.
26. On the issue of registration, PW1 stated that title to the suit land is registered in the name of deceased 2. He produced in evidence, a copy of green card and certificate of official search indicating that the suit land was registered in the name of deceased 2 and title deed issued thereto on 29th May 2009.
27. The evidence of PW1 was corroborated by a copy of the title deed and green card in respect to the suit land, DExhibits 1 and 2 respectively.
28. DW1 testified that after the death of deceased 2, she obtained a grant of letters of administration to his estate and transferred the suit land to herself and subsequently to her children. However, no documentary evidence was adduced to buttress that assertion.



29. As regards open and exclusive possession of the suit land, it is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
30. PW1 testified that at the time of transfer of the suit land to deceased 2, deceased 1 had been in occupation of the suit land since 1971, a period in excess of 36 years. That therefore, both deceased 2 and 3's rights over the suit land have been extinguished by effluxion of time.
31. Further, PW1 stated that he cultivates the same and has planted trees thereon; see *Titus Ong'ang'a Nyachio* case (supra).
32. The plaintiff alleges that his entry into the suit land was by way of a sale. Be that as it may, I note that PExhibits 5 and 6 do not indicate the suit land as the land being purchased.
33. The viva voce evidence of DW1, was that she is the one who cultivates the suit land. However, I observe that this contradicted the testimony of DW2 who stated that the person who cultivates the suit land is unknown to him, although he had earlier indicated in his statement dated 31st May 2023 that he is in fact the one who utilizes the suit land.
34. It is also important to point out that DW3 stated that she did not know who is in possession of the suit land. She remarked thus:
- “ ... I do not know who uses the suit land...”
35. Regarding the third dictate, PW1 stated that he has been in occupation of the suit parcels of land since 1971. That it was not until 19th January 2010, when deceased 2 started laying claim to the suit land and caused him to be arrested and charged with the offence of trespass in Oyugis Law Courts Criminal Case No. 33 of 2010.
36. Clearly, that is a period in excess of 12 years. Indeed, the defendants have never filed an eviction notice against the plaintiff.
37. It is the plaintiff's contention that the defendants had opportunity to interrupt the continuous possession of the suit property by the plaintiff. However, they failed to do so as noted in *Wanyoike Gathure -vs- Beverly* (1965) EA 514 at 518.
38. Evidently, the plaintiff has been in peaceful and continuous enjoyment and use of the suit land in excess of twelve years. The defendants have been dispossessed thereby; see *Halsbury's Laws of England 4th Edition* Volume 28.
39. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya provides that he who alleges must prove; see also *Wilson Kazungu Katana case* (supra).
40. In *Kirugi and another-vs-Kabiya and 3 others* (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities.
41. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendants on a balance of probabilities. He is entitled to the orders sought in the amended originating summons dated 3rd April 2017.
42. Accordingly, I enter judgment for the plaintiff against the defendants in terms of orders 1, 2, 3, 4 and 5 sought on the face of the amended originating summons and as stated in paragraph 8 (a), (b), (c), (d) and (e) hereinabove.



43. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 5TH DAY OF DECEMBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Odhiambo holding brief for Ochwal, learned counsel for the plaintiff.
2. Plaintiff- present
3. Luanga- Court Assistant

