



**Ekirapa v Ojuo (Environment & Land Case 161 of 2016)
[2022] KEELC 169 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 161 OF 2016**

**AA OMOLLO, J
JUNE 22, 2022**

BETWEEN

ROBERT MANDE EKIRAPA PLAINTIFF

AND

JOSEPHINE AKOTH OMUSE OUJO DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendant via a plaint dated 5th November 2014 seeking to be granted the following:
 - a) Eviction order.
 - b) Costs of this suit.
 - c) Any other further relief that deems fit and just for grant by this humble court.
2. The plaintiff pleaded that he is the registered legal owner of the land parcel No. South Teso/angoromo/7775 and the defendant without any colour of right and without the consent of the plaintiff has trespassed onto the plaintiff's parcel by digging, planting crops, cultivating on the suit property.
3. The defendant entered appearance and filed a defence dated 19th November 2014. She denied the allegations as raised by the plaintiff. She averred that she qualifies to be the owner of the suit land by way of adverse possession having been in actual occupation of the same for over 12 years.
4. The matter was set down for hearing on 8th October 2020 with the plaintiff Robert Mande Ekirapa testifying as PW1 by adoption of his witness statement dated 5/3/2020. He testified that he is the sole absolute registered owner of L.R. South Teso/Angoromo/7775 which is a resulting subdivision of South Teso/Angoromo/801. The original title number 801 was owned by Ekirapa Omedel Ongamo-deceased which land the witness stated that he obtained through transmission vide Busia HC Succession Cause No. 85 of 2008. He asserts that the defendant has no interest in the land and is a



- trespasser after he found in 2014 the defendant had built a house which encroached on a portion of his land. The plaintiff produced the documents in his list of documents as PEX1-4. He asked the court to help him remove the defendant from his land and be paid the costs of the case.
5. On cross-examination by counsel for the defendant, PW1 stated that he was sure the defendant encroached in the year 2014. That he was not aware his deceased father is called Ekirapa Omedele and defendant's husband getting into a sale of land agreement dated 16/10/1992. The witness also denied knowledge that the defendant's husband and mother in-law had been buried on the suit land. The original number land L.R. No. 801 was subdivided to produce three numbers being L.R. Nos. 7774, 7775 and 7776. He was not aware the defendant's husband entered into a sale agreement with his father and when he was shown an agreement, he said Mande Ekirapa is him but he denied signing the agreement. He denied that the defendant was living on the land when his father was alive.
 6. He said that he was a stranger to the application made to the Land Control Board by his father and the defendant's husband. He did not know if his father paid the survey fees. He said that he used title No. L.R. 7775 to secure a loan from the bank and he is still paying the loan with the balance is approximately Kshs.1 Million. The plaintiff denied that the defendant started living on the land from 1992 although in his plaint he did not plead when the defendant entered the land. There is only one house on the land which he according to him, he started seeing in the year 2014. On re-examination, PW1 said he did not sign the sale agreement and he was not present and he did not know where the 1½ acres is. His father never transferred the sold portion to the alleged seller and the application for Land Control Board is undated. That the form is also unsigned by the owner and reiterating that he started seeing Josephine on the land in 2014. He reported her to the assistant chief but she never moved out thus he filed case no. 445 of 2014.
 7. John Ibaba Ekirapa who is a brother to the plaintiff testified as PW2 and adopted his witness statement dated 3rd September 2020. He testified that the plaintiff who is the registered owner of L.R South Teso/Angoromo/7775 acquired through transmission vide Busia HC Succession No. 85 of 2008. He stated that he knew the defendant adding that she had trespassed onto the plaintiff's land around 2014. In cross-examination, PW2 stated that the defendant has one house on the land admitting that his statement does not state that the defendant entered the land in 2014. He could not tell if the defendant entered the land earlier than 2014. He did not know the defendant's husband but he knows one of the defendant's son but he did not know if he was born on the land.
 8. Dennis Omukaga Papai testified as PW3 and adopted his brief written statement dated 3rd September 2020. During cross-examination, he stated that he has known the defendant for a long time as a neighbour and the defendant and her husband lived on the suit land but he does not know when they entered the land. When he saw the defendant living there, Robert's father had died and as per the death certificate shown to him, he had died on 30th May 2004. He had no idea if Josephine had children born on the suit land. On re-examination, he stated that he has known Josephine for more than 10 years.
 9. Josephine Akoth Omuse Oujo testified as the defendant's witness, DW1. She adopted her witness statement as her evidence in chief where she stated inter alia, that she has known the plaintiff since 1996 after she started living in the suit land when she got married to David Omuse Oujo-deceased. That her husband who died in the year 2004 had built on the land which he had purchased from Mzee Ekirapa Omedele in the year 1992. She produced the sale agreement as DEX 1. Which according to the defendant the plaintiff as the son to Ekirapa Omeden also signed as a witness to the seller. DW1 continued that her husband bought 1½ acres which is the portion they are using to date. She produced an application for subdivision done on the original title as DEX 2. She went on to say that her father-in-law was buried on the suit land so was her mother-in-law and husband. They lived peacefully until the year 2014 when the plaintiff wanted her to be his witness and she refused. That is when he brought



this case and the plaintiff has not refunded the money or given alternative land. She asked the court to get her title for 1½ acres and the plaintiff be restrained from activities on the suit land. That the portion they occupy is demarcated on the ground.

10. Upon cross examination by Mr Were counsel of the plaintiff, DW1 stated she is claiming L.R. No. 7775 which was curved out of 4012 and which is the land her husband purchased in the year 1992. She said that she entered the land in the year 1996. She discovered the plaintiff had taken succession of his father's estate when she visited the land's office. She did not file objection because she did not know when he filed the same. She knew the land was charged to the bank as shown in the search and she has also filed a case claiming the land by way of adverse possession.
11. Victor Onyango Omuse testified as DW2 and adopted his witness statement dated 26th October 2020 as his evidence in chief. He stated that the defendant is his mother and he is 29 years old and he was born on the land owned by his father. His father was called David Omuse Oujo who purchased the land from the plaintiff's father and his father died leaving them on this land. All his life he has lived on the land. On cross-examination by plaintiff's counsel, he said he was told by his mother about the sale of the land and he lived on the land except now he lives in Burumba since 2011.
12. The plaintiff filed his submissions on 25th January 2022 and submitted that the plaintiff is the rightful owner of the suit land which originated from land parcel L.R. South Teso/Angoromo/801 which comprised part of the estate in the succession and which gave rise to among other parcels to the plaintiff's. He submitted that the defendant admitted to residing and using part of the suit parcel and she alleged to have filed a case for adverse possession without disclosing the case number but in the present suit there is no counterclaim for adverse possession against him. He further submitted that the defendant does not have locus standi to sue or even be sued on behalf of her late husband whom she alleges bought the land from the plaintiff's father and on that count the counterclaim would automatically fail. He urged the court to allow their case as he has proved it on a balance of probabilities.
13. The defendant filed her submissions on 25th January 2022 and submitted that by a search certificate, the plaintiff has shown the court that the land is charged to the National Bank (K) Ltd and it follows therefore that he has no claim to exclusive rights and/or any rights for that matter to the suit property unless he discharges the title so that it can revert to his exclusive ownership. She further submitted that even if he had exclusive rights to the land, the same has been extinguished by the Limitations of Actions Act by virtue of the fact that the defendant took occupation of the suit property together with her husband in the year 1996 and the defendant has been in continuous occupation of the same to date which is a period of 26 years.
14. I have carefully examined the parties' pleadings and their rival submissions, I opine that the issues that come up for determination are;
 - i) Whether the plaintiff's claim of eviction is validated;
 - ii) Who should pay the costs of this suit?
15. On the first issue, there is no doubt that the plaintiff is the registered proprietor of South Teso/Angoromo/7775 as has been exhibited by the evidence of his witnesses and the copy of search certificate and copy of title deed produced as PEX1 and PEX3 respectively. He has stated that the defendant trespassed onto his land in 2014 and built on it illegally. His evidence was corroborated by PW2 and PW3. However, on cross examination, PW3 admitted to knowing the defendant as a neighbour for a period of over 10 years. He said that he noticed the defendant living on the suit land after the plaintiff's father had died on 30th May 2004. The defendant on the other hand has testified to being on the land since 1996 after she got married. It was her evidence that her late husband built on the land after buying



it from the plaintiff's father in 1992 and in support of this assertion, she relied on the sale agreement produced as DEX 1. She stated that the plaintiff signed a witness to the sale agreement although the plaintiff denied his signature on the agreement. I find that the defendant's evidence was corroborated by her son, DW2.

16. Going by the evidence of PW3, DW1 and DW2, there is sufficient evidence that the defendant has been in possession and occupation of the suit land for a period of over 12 years. Although plaintiff denied knowledge that some of the defendant's relatives were buried on the land but denial did not disentitle the defendant of rights acquired by her possession on the land. The defendant did not raise adverse possession as a counterclaim in this suit but it is not a bar from using it as a defence. Further, the denial of a signature on sale agreement is not sufficient to invalidate the agreement without examination report of an expert witness of forgery.
17. From the evidence on the timelines the parties have highlighted, I find proof that the defendant has been in occupation and possession of the suit land for a period of over 12 years. The plaintiff raised the issue of locus on whether the defence of adverse possession is available to the defendant. In my view and I so hold the Defendant did not require to take out the letters of administration of her husband's estate for her defence of adverse possession to be valid. This is because the production of the sale agreement served the purpose only of determining the manner of entry into the suit land and the size of land being claimed. In a scenario where the defendant has personally lived on the land for more than 12 years, then she gains capacity to bring the suit as of right.
18. Though the plaintiff is the registered proprietor of L.R. No. 7775 and has absolute rights to use his land to the exclusion of all others by virtue of Section 24 and 25 of the [Land Registration Act](#) that right is subject to other provisions. For instance, Section 28 of the same Act, the law allows overriding interests that are not noted in the register of the title holder to be respected. Further Section 7 of the Limitation of Actions Act provides that no action to recover land can be brought after 12 years. Therefore, I hold that the plaintiff's suit for eviction is time barred by virtue of the defendant having been in possession of the suited portion for a period in excess of 12 years.
19. In conclusion of the foregoing is that the plaintiff suit is dismissed for lack of merit with costs to the defendant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF JUNE 2022.

A. OMOLLO

JUDGE

