



**Musinjiro v Omba (Environment & Land Case 41 of 2021)  
[2022] KEELC 3859 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3859 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 41 OF 2021  
GMA ONGONDO, J  
JUNE 15, 2022  
(FORMERLY MIGORI ELCC NO 799 OF 2017)**

**BETWEEN**

**PHILIP OBONDI MUSINJIRO ..... APPLICANT**

**AND**

**JACKTON OTIENO OMBA ..... RESPONDENT**

**JUDGMENT**

1. On April 8, 2016, the plaintiff, Philip Obondi Musinjiro through M/S Momanyi, Manyoni & Company Advocates, filed the present suit by way of an Originating Summons dated April 5, 2016, pursuant to order 37 rules 7 and 8 of the [Civil Procedure Rules, 2010](#).
2. On November 20, 2017, the plaintiff filed an amended Originating Summons dated November 11, 2017 pursuant to order 8 rule 1 and order 37 rules 7 and 8 of the Civil Procedure Rules (*supra*).
3. By way of Notice of Motion dated January 11, 2018 and filed on January 16, 2018, brought pursuant to section 100 of the [Civil Procedure Act](#), chapter 21 Laws of Kenya the plaintiff sought leave of court to amend the amended Originating Summons earlier filed on the basis that the title of the suit land was erroneously indicated as Kasipul/Konuonga/981 instead of Kasipul/Konuonga/619. The Application, being unopposed, was allowed accordingly by the honourable court on February 1, 2018 with costs in the cause.
4. The plaintiff through his counsel then filed further amended Originating Summons dated January 11, 2018 on January 16, 2018 pursuant to order 8 rule 1 and order 37 rules 7 and 8 (*supra*).
5. The gist of the plaintiff's case is that he has acquired by adverse possession, part of land title number West Kasipul/Konuonga/619 measuring approximately zero decimal four hectares (0.4 Ha) in area. That the same has been subdivided into LR nos West Kasipul/Konuonga/1065 and 1066.



6. The amended originating summons is anchored on a twenty-three (23) paragraphed supporting affidavit of the plaintiff annexed thereto. The plaintiff stated, *inter alia*, that he purchased the suit property in 1995 from the late Nicholas Omollo Omba, a brother to the defendant herein although he had misplaced the sale agreement.
7. The plaintiff further stated that following the sale, the vendor, the late Nicholas Omollo Omba, gave him possession of the suit property. That thereafter, he planted maize, sugarcane and other subsistence crops on it.
8. The plaintiff also stated that following the demise of Nicholas Omollo Omba, the defendant applied for grant of letters of administration to the Estate in Oyugis Principal Magistrate's Court Succession Cause no 121 of 2009. That the grant was confirmed in his names. That the defendant has failed to process title for him, despite signing a form for transfer by personal representative to a person entitled under intestacy.
9. The plaintiff laments that the original land was sub-divided and a Mr Stephen James Okelo was given half of the land parcel number West Kasipul/Konuonga/619 and the defendant got registered in land parcel number West/Kasipul/Konuonga/981 which ought to have been the plaintiff's portion of land. That the defendant on May 10, 2016, being aware of the instant suit, subdivided the suit land into land parcels number W.Kasipul/ Konuonga/ 1065 and W.Kasipul/ Konuonga/1066, both registered in the defendant's name.
10. The plaintiff urged the court to find that the subdivision so effected by the defendant was illegal as the respondent's title had been extinguished in 2007. That the titles to the two subdivisions be cancelled and revert to the suit land which should be transferred to the plaintiff.
11. On February 1, 2018, the plaintiff's counsel filed submissions dated January 30, 2018 and reiterated the contents of the pleadings on record and urged the honourable court to grant the orders so sought in the pleadings. The matter was slated for judgment on February 22, 2018.
12. On February 16, 2018, the defendant, acting in person, filed an application by way of a Notice of Motion of even date pursuant to section 3A of the *Civil Procedure Act* (*supra*). He stated, *inter alia*, that the matter had been proceeding *ex parte* without his knowledge since it got transferred from Kisii High Court, to Migori Environment and Land Court. He denied having been served with any hearing notice to show the same.
13. In response to the application, the plaintiff through his counsel filed a replying affidavit where the plaintiff stated that he had lodged a restriction on the suit land to preserve it until hearing and determination of the instant suit. The plaintiff stated that the defendant was served but failed to defend the suit and only lodged the application as he had unsuccessfully tried to transfer the suit land to a different purchaser for value.
14. On December 13, 2018, the application was allowed by the honourable court and directed that the defendant be served with the Originating Summons and to file a Replying Affidavit within the next 14 days from that date.
15. Accordingly, the defendant, acting in person, filed a Replying Affidavit sworn on February 26, 2018 and filed on even date opposing the suit. He deposed in part that the plaintiff lodged a restriction on land parcel West Kasipul/Konuonga/981, in which the plaintiff has no interest as it is not the subject of this suit. He thus, urged the honourable court to remove the said caution.
16. Further, the defendant stated that the suit land is registered in his name, having inherited the same by way of succession from his kin. He therefore, urged the honourable court to dismiss the instant suit.



17. On February 27, 2018 the defendant lodged Miscellaneous Application no 2 of 2018 at Migori Environment and Land Court vide a Notice of Motion dated February 26, 2018 pursuant to section 3A of the *Civil Procedure Act* (*supra*). The defendant urged the honourable court to issue an order removing the caution/restriction lodged in parcel no West/Kasipul/ Konuonga/981 by the plaintiff herein. The defendant affirmed that the plaintiff has no interest in the said land and that it is not the subject of the instant suit.
18. By Grounds of Opposition dated March 23, 2018 and filed on April 11, 2018, the plaintiff opposed the miscellaneous application on grounds that the same was fatally defective as it was not filed in the instant suit. Counsel also argued that the defendant did not attach annexures to verify the allegations made in the Supporting Affidavit on which the application was anchored.
19. On September 20, 2018, the court ordered and directed that Miscellaneous Application no 2 of 2018 at Migori Environment and Land Court be consolidated with Migori ELC Case no 799 of 2019 (the present suit). That the latter be the lead file herein.
20. The matter proceeded by way of *viva voce* and affidavit evidence.
21. On October 16, 2019, the plaintiff Philip Obondi Musinjiro (PW1), testified that the defendant is a brother to Nicholas Omollo Omba (deceased) who sold him the land being L R No West Kasipul/ Konuonga/981. That following the demise of the said deceased in 2000, the defendant obtained a certificate of grant to his estate on January 20, 2012. That the defendant failed to transfer the parcel of land to him. That the defendant subdivided LR no West Kasipul/Konuonga/981 into L R nos West Kasipul/Konuonga/ 1065 and 1066.
22. On cross-examination, the plaintiff admitted that there was no sale agreement witnessed by the area chief between him and the deceased regarding the suit land. He insisted that he did not lease the land but bought it from the deceased. During re-examination, the plaintiff clarified that LR no 619 is not his originally but he bought it from the defendant's brother.
23. On February 25, 2021, the defendant (DW1) testified that the plaintiff is his uncle and the suit land subdivisions namely LR nos West Kasipul/Konuonga/1065 and 1066 measuring approximately 0.14 Ha and 0.32 Ha respectively belong to his late brother Nicholas Omolo. He relied on his Replying Affidavit sworn on February 22, 2018 and filed on February 26, 2018. The court adopted the same as part of his evidence.
24. On cross-examination, the defendant admitted to being issued with grant of letters of administration to his late brother's estate. He also admitted to signing the transfer form as alleged by the plaintiff but stated that it was not meant to transfer the original land in part to the plaintiff. Further, the defendant stated that he subdivided the original land to LR nos 980 and 981, which he transferred to James Stephen Oluoch Okeyo and himself respectively. He then subdivided LR no 981 into LR nos 1055 and 1056. He admitted that the plaintiff used to occupy part of the original land LR no 619 during the lifetime of his brother, which occupation has continued to date.
25. When the matter came up on October 6, 2021 for further hearing of the defendant's case, the court (Kullow J) directed that the matter be transferred to this court as the suit was part heard.
26. The court had issued summons to Mr Joshua Olus Sure, the chief Konuonga Location within Homa Bay County to appear before court and testify as DW2. On January 31, 2022, the defendant's case was deemed closed as he failed to attend court for further hearing of his case despite being aware of the date in line with article 159 (2) (b) of the *Constitution* of Kenya 2010.



27. Learned counsel for the plaintiff filed submissions dated March 14, 2022 on March 17, 2022. Counsel submitted, *inter alia*, that the plaintiff has proved his claim as his assertions of occupation from 1995 to 2015 was not challenged by the defendant. Counsel further submitted that the defendant acknowledged the plaintiff's interest in the suit land.
28. Learned counsel relied on various provisions under the [Land Act](#), 2016 (2012), The [Land Registration Act](#), 2016 (2012) and the [Limitation of Actions Act](#), chapter 22 Laws of Kenya. Counsel also relied on the case of [Peter Okoth vs Ambrose Ochido Andajo & Benedict Odhiambo Oketch](#) (2021) eKLR, to buttress his submissions.
29. The defendant did not file submissions herein.
30. From the foregoing, the issues for determination are thus:
  - a. Whether the plaintiff has proved his case to warrant grant of the orders sought in this suit; and
  - b. Who should bear the costs of this suit?
31. The plaintiff stated that he purchased the suit property in 1995 from the late Nicholas Omollo Omba, a brother to the defendant/ respondent herein. That he had misplaced the sale agreement.
32. During cross-examination, the plaintiff admitted that there was no sale agreement for the suit property. He stated in part: "...the sale agreement made in 1995 is absent..."
33. Section 3(3) of the [Law of Contract Act](#) chapter 23 Laws of Kenya provides a regulatory legal framework for contracts for the disposition of an interest in land. The Section provides as follows:-

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

  - (a) the contract upon which the suit is founded:
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”
34. It is my considered view that section 3(3) of the [Law of Contract Act](#) (*supra*) makes a strict formal requirement whose legal ramification is to completely preclude the cognizance of any non-compliant contract for disposition of interest in land.
35. This court is conscious of oral agreement of sale of property and its unenforceability as a contract; see [Yaxley vs Gotts & Anor.](#) (2000) Ch 162.
36. I therefore, find that the plaintiff has failed to adduce any evidence to prove that there was indeed, a sale of the suit property to him by the late Nicholas Omollo Omba.
37. I now proceed to consider the issue of adverse possession.
38. The law on adverse possession and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts. See [Wambugu vs Njuguna](#)



- (1983) KLR 172 and *Mtana Lewa vs Kabindi Ngala Mwangandi* (*infa*), amongst other authoritative pronouncements.
39. By the provisions of section 7 of the *Limitation of Actions Act*, a registered owner of land may not bring an action-
- “...to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person”.
40. At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law. Section 38 of the Act permits the adverse possessor to apply to the High Court (read this court by dint of article 162 (2) (b) of the *Constitution* of Kenya, 2010) for an order that he be registered as the proprietor of the land.
41. The Court of Appeal sitting at Malindi in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated thus:
- “...the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.”
42. The honourable court went on to cite the case of *Littledale v Liverpool College* (1900)1 Ch 19, 21, to fortify the findings.
43. The requirements for adverse possession in Kenya have also been set out in the case of *Mbira v Gachubi* (2002) IEALR 137 in which the court held that:
- “.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
44. Likewise, in *Jandu v Kirplal & Another* (1975)EA 225, it was held:
- “.....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”
45. The ingredients were also discussed by the court of Appeal in the case of *Mtana Lewa -v- Kabindi Ngala Mwangandi* (2005)eKLR where it was held that:
- “ Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”
46. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. That the



possession should not have been through force, nor in secrecy and without the authority or permission of the owner.

47. The plaintiff has asserted that he has been in occupation of the suit property from 1995 to 2015, which is a period of over 12 years. The plaintiff further stated that he has been in possession of the suit property openly and continuously and without interruption for all that period.
48. There was no evidence availed to contradict the plaintiff's averments. It is treated as gospel truth.
49. In fact, the defendant himself admitted during cross-examination that the plaintiff is still in occupation of the suit property. He stated, inter alia, "...PW1 used to occupy part of L R No 19 during the lifetime of my late brother. He occupies the same to date."
50. It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See *Sophie Wanjiku John v Jane Mwihaki Kimani* Nairobi ELC Civil Suit No 490 of 2010. The plaintiff produced a copy of the green card for land parcel no West Kasipul/Konuonga/619 and search certificate for West Kasipul/Konuonga/981 title confirming that the two parcels are registered in the defendant's names.
51. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the plaintiff has proved his case on a balance of probability and has brought himself within the limits of the doctrine of adverse possession.
52. In the result, the suit by way of originating summons dated November 11, 2017, and filed on the November 20, 2017 (duly amended by way of Notice of Motion dated January 11, 2018 and filed on January 16, 2018), is allowed. I proceed to enter judgment as follows:
  - a. That the defendant shall transfer to the plaintiff land parcel Numbers West Kasipul/Konuonga/1065 and 1066 measuring approximately 0.14 Ha and 0.32 Ha respectively at the latter's expense within 30 days from the date hereof, failing which the deputy registrar of the Environment and Land Court at Homa Bay shall execute, on behalf of the defendant, the necessary transfer documents.
  - b. Each party to bear their own costs
53. Orders accordingly.

**G M A ONG'ONDO**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 15<sup>TH</sup> DAY OF JUNE 2022.**

**G M A ONG'ONDO**

**JUDGE**

**Present**

**1. Plaintiff**

**2. Okello, Court assistant**

