



**Abayo v Rege (Environmental and Land Originating Summons  
36 of 2021) [2022] KEELC 3729 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 36 OF 2021**

**GMA ONGONDO, J**

**JULY 27, 2022**

**BETWEEN**

**SILVANCE ODHIAMBO ABAYO ..... PLAINTIFF**

**AND**

**MARTIN ONYANGO REGE ..... DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. The instant suit concerns land reference numbers Kanyada/K/Kalanya 4708 and 4340 measuring approximately zero decimal five five hectares (0.55 Ha) and zero decimal five three hectares (0.53 Ha) in area and contained in registry map sheet numbers 18 and 26 respectively (the suit parcels of land herein). They are located within Homa Bay County.
2. The plaintiff is represented by the firm of M/S OM Otieno and Company Advocates.
3. The defendant is represented by the firm of M/S Edward Kisia and Company Advocates. Initially, he was represented by the firm of Onchuru, Oyieko & Company Advocates.

**B. Summary of the parties' respective cases**

4. On August 30, 2013, the plaintiff, through his advocates, filed the present suit by way of an originating summons dated August 29, 2013. The same was brought pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 Laws of Kenya, order 37 rule 7 and 3A of the *Civil Procedure Rules*, 2010 and sections 38 of the *Limitations of Actions Act* Chapter 22 Laws of Kenya.
5. The plaintiff has sought the orders infra:
  - a) A declaration that the defendant's right to recover the entire parcels of land with co-joined surface and/or abutting each other, commonly known as Kanyada/K/Kalanya 4708 & 4340,



measuring approximately 1.03 Hectares, barred under the *Limitations of Actions Act*, Chapter 22 Laws of Kenya, and his title over the said parcel of lands in occupation/use of the plaintiff thereto extinguished on the ground that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of 1.03Ha for a period exceeding 20 years.

- b) That there be an order that the Land Registrar, Homa Bay County, do register the plaintiff as the proprietor of the entire co-joined and abutting parcels measuring 1.03 Ha of Kanyada/K/Kalanya 4708 & 4340, in place of the defendant and/or the register thereof be rectified to reflect the plaintiff's ownership of the aforesaid 1.03 Ha under his use and current continued occupation.
  - c) That the defendant herein be ordered to execute all the requisite papers necessary to have the plaintiff be registered as owner of the entire co-joined and abutting parcels measuring 1.03 Ha of Kanyada/K/Kalanya 4708 & 4340, decreed by the court, in default the deputy registrar and/or court executive officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the court.
  - d) That this honourable court be pleased to issue permanent order of injunction against the defendant, his agents, servants and/or employees from whatsoever manner, interfering with the plaintiff's occupation and/or use over co-joined and abutting parcels of land otherwise known as Kanyada/K/Kalanya 4708 & 4340, measuring 1.03Ha , under the plaintiff's occupation.
  - e) Costs of this originating summons be borne by the defendant
  - f) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
6. The originating summons is anchored on a thirty-six (36) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff's lamentation is that he has acquired by adverse possession, the suit parcels of land which are registered in the name of the defendant. He contends that he has been in occupation of the suit parcels of land since 1982. That the parent land parcel was Kanyada/K/Kalanya 1036, owned by one Ambrose Asino (deceased) and registered in the name of Nerea Ogutu Asino but has since been sub-divided to create the suit parcels of land.
7. The plaintiff asserted that part of the total area of the parent land was hived off and two titles created, to wit, the suit parcels of land, which were registered in the names of one Peter Oduor Abuogo and later transferred in the name of the defendant herein. The remainder of the land retained the parent title number, Kanyada/K/Kalanya 1036.
8. Together with the originating summons, the plaintiffs filed an application by way of a notice of motion dated August 29, 2013 pursuant to Sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and order 40 rules 1, 2 and 2A of the *Civil Procedure Rules* 2010. The plaintiff sought five orders including an order of interim injunction restraining the defendant either by himself, agents, servants and/or any other person acting under his instructions from alienating, transferring, interfering and/or evicting the plaintiff from the suit parcels of land, which has been in use and/or possession of the plaintiff.
9. The honourable court certified the application as urgent on August 30, 2013 and directed the plaintiff to serve the defendant. The matter was then fixed for inter partes hearing on September 16, 2013. However, when the application came up for hearing on the said date, the parties agreed by consent to



- withdraw the application with no order as to costs. The court directed the parties to maintain status quo.
10. PW1, Silvanice Odhiambo Abayo, testified on March 3, 2015. He stated that the parent land belonged to his late uncle Ambrose Asino Ager who passed away in 1986. That he has been in occupation of the suit parcels of land since 1982 and has planted trees and bananas thereon. That the parent land was sub-divided into the suit parcels of land. That on May 23, 2013 the area chief wrote to him to vacate the suit parcels of land.
  11. In his testimony, PW1 relied on a letter from the chief dated May 23, 2013, certificate of official search for plot No 4340 dated July 12, 2013, certificate of official search for plot No 4708 dated July 12, 2013, map, copy of green cards for plot nos 1036, 4340 and 4708 and photographs (which were produced as PExhibits 1, 2, 3, 4, 5(a), (b) and (c) and 6(a), (b),(c) respectively as per list of documents dated August 29, 2013. He added that the defendant does not occupy the suit parcels of land.
  12. PW1 also cast aspersions on the validity of the agreement for sale of land between Ambrose Asimo Ager (deceased) and Peter Odiwuor Obuogo. Thus, he stated that the 3<sup>rd</sup> installment of payment is indicated to have been made on February 5, 1988 at which time the said Ambrose Asimo Ager was already deceased. That details of the witness to the agreement, one Nereah Agutu, were not indicated therein.
  13. The defendant opposed the suit vide a replying affidavit lodged on September 13, 2013. He asserted that he is the registered proprietor of the suit parcels of land and that he is a bona fide purchaser for value with consideration who enjoys possession of valid titles duly issued by the relevant government agencies. Thus, he urged the court to dismiss the suit with costs.
  14. On April 16, 2018, the honourable court deemed both the plaintiff's case and defendant's case closed, the defendant's counsel having been duly served as per the affidavit of service sworn on March 26, 2018 by the plaintiff's counsel but failed to defend the suit. The court then ordered and directed the plaintiff's counsel to file and serve submissions within 21 days from that date.
  15. By a notice of motion application dated March 1, 2019 and filed herein on March 13, 2019, the defendant sought to have the ex parte court orders entered on April 16, 2018 set aside. That the defendant be granted a date for hearing of the defense case. The application was opposed by the plaintiff.
  16. The honourable court allowed the application and fixed the defendant's case for priority hearing on April 22, 2021 pursuant to article 159 (2) (b) of the Constitution of Kenya, 2010.
  17. When the matter came up for defence hearing on September 29, 2021, the court (Honourable Kullow J) ordered and directed that the suit be transferred to this court for further hearing and determination.
  18. DW1, Martin Onyango Rege, testified on January 27, 2022. He adopted his witness statement of even date as part of his evidence. He deponed, inter alia, that he is a purchaser for value who conducted due diligence before purchasing the suit parcels of land. That he neither witnessed any agricultural activities being carried out on the land nor was there a homestead on the suit parcels of land when he visited them prior to purchase. On cross examination, DW1 admitted that he was not present during the sale of the parent land between Ambrose Asino Ager (deceased) and Peter Oduor Obuogo. That he has no mutation forms giving the resultant sub-divisions and survey report in respect to the suit parcels of land. That he similarly does not have transfer forms arising out of the transaction between Ambrose Asino Ager (deceased) and Peter Oduor Obuogo nor minutes of the area land control board meeting.



19. DW2, Naftali Otieno Musa, testified on February 23, 2022, relying on his witness statement filed in court on January 27, 2022 which was adopted as part of his evidence accordingly. He stated that he introduced the defendant to one Peter Oduor Obuogo who sold him the suit parcels of land. He, however, admitted that when they visited the suit parcels of land, they found an old man in occupation and there was a portion of the land that was under cultivation.
20. That being the close of the defense case, the honourable court directed parties to file and exchange submissions.
21. Accordingly, learned counsel for the plaintiff filed submissions dated March 15, 2022 on March 22, 2022. Counsel identified twin issues for determination, to wit, whether the plaintiff has proved the claim for adverse possession and who should bear the costs of the suit. Counsel relied on various authorities including the case of *Kenya Tea Development Authority v Jackson Gachubi [2006] eKLR* and *Mtana Lewa v Kabindi Ngala Mwangandi [2015] eKLR*, to fortify his submissions.
22. Learned counsel for the defendant filed submissions dated April 26, 2022 on April 28, 2022, urging the court to dismiss the plaintiff's claim. Counsel relied on the case of *Joseph Macharia Kairu v Kenneth [2021] eKLR*, to buttress his submissions.

### C. 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 v Falcon Grounds Ltd [2000] 2 EA 385*.
24. There is a list of agreed issues dated December 9, 2013 filed on even date and signed by the plaintiff's counsel. I also bear in mind order 15 of the *Civil Procedure Rules*, 2010.
25. I have duly considered the entire originating summons, the testimonies of PW1 and the plaintiffs' submissions as well as the testimonies of DW1 and DW2 and the defendant's submissions. So, the issues for determination are as captured in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein 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.

### D. Discussion and determination

26. It must be noted that the plaintiffs' claim is for the whole of land reference numbers Kanyada/K/Kalanya 4708 and 4340 measuring approximately 1.03 hectares in area, the suit parcels of land herein. Therefore, the plaintiff's claim is over definite portions of land; see *Muthuita v Wanoe & 2 others [2008] 1KLR (G&F) 1024*.
27. On the issue of registration, PW1 stated that titles to the suit parcels of land are registered in the name of the defendant. He produced in evidence, copies of certificate of official search for the suit parcels of land dated July 12, 2013 which revealed that the defendant is the proprietor of the suit parcels of land with effect from May 13, 2011 under the repealed Registered Land Act Chapter 300 Laws of Kenya as noted in *Wainaina v Murai & others [1976-80] 1KLR 283 at 289 and 290*.



28. As regards open and exclusive possession of the suit parcels of land, PW1 testified that he has been in occupation of the suit parcels of land since 1982. That he lives thereat. That he has planted trees and bananas thereon.
29. It is the plaintiffs' assertion that that he is in cultivation of the suit parcels of land. This is discerned on ground 5(a) and (b) of the originating summons and his testimony.
30. It is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others [2017] eKLR*.
31. Regarding the third dictate, PW1 stated that he has been in occupation of the suit parcels of land since 1982 to date. That it was not until May 23, 2013 when he was summoned by the area chief who notified him that the parcel of land he lived on belongs to the defendant, a fact he confirmed upon conducting searches on the suit parcels of land. Clearly, that is a period in excess of 12 years. Indeed, the defendant has never filed an eviction notice against the plaintiff.
32. It is the plaintiff's contention that the defendant had opportunity to interrupt the continuous possession of the suit property by the plaintiff. However, he failed to do so.
33. DW1, Martin Onyango Rege, testified that he is a purchaser for value who conducted due diligence before purchasing the suit parcels of land. In *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR*, the Court of Appeal cited the case of *Katende v Haridar & Company Limited [2008] 2 EA 173* where the Court of Appeal in Uganda held that:
  - ' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:
    - (a) he holds a certificate of title;
    - (b) he purchased the property in good faith;
    - (c) he had no knowledge of the fraud;
    - (d) he purchased for valuable consideration;
    - (e) the vendors had apparent valid title;
    - (f) he purchased without notice of any fraud;
    - (g) he was not party to any fraud.'
34. The defendant admitted during cross-examination that he was not present during the sale of the original land parcel between Ambrose Asino Ager (deceased) and Peter Oduor Obuogo. That he has no mutation forms giving the resultant sub-divisions and survey report in respect to the suit parcels of land. That similarly, he neither has transfer forms arising out of the transaction between Ambrose Asino Ager (deceased) and Peter Oduor Obuogo nor minutes of the land control board meeting.
35. Notably, the defendant failed to call the said vendor, Peter Oduor Obuogo, to testify concerning the alleged sale. This created a serious loophole in his defense.
36. DW2 stated that when they visited the suit parcels of land prior to the purchase of the same. That they found an old man in occupation and that there was a portion of the land that was under cultivation.



37. Thus, it is my considered view that the conduct of the defendant was not of a diligent bona fide purchaser as described in the case of *Katende v Haridar & Company Limited* (*supra*).
38. Clearly, the plaintiff has demonstrated that he has been in peaceful and continuous enjoyment and use of the suit parcels of land in excess of twelve years. The defendant has been dispossessed thereby; see Halsbury's Laws of England 4<sup>th</sup> 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 v 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 defendant on a balance of probabilities. He is entitled to the orders sought in the originating summons.
42. Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders 1, 2, 3, 4 and 5 sought on the face of the originating summons and as stated in paragraph 5 (a), (b), (c), (d) and (e) hereinabove.
43. It is so ordered.

**DELIVERED, SIGNED AND SIGNED AT HOMA BAY this 27<sup>th</sup> day of July 2022**

**GMA ONG'ONDO**

**JUDGE**

**Present**

**Mr Odhiambo Kanyangi holding brief for OM Otieno for the plaintiff**

**Angela and Fiona, Court Assistants**

