



Mbogo & 3 others v Oduor & another (Environment & Land Case 39 of 2021) [2022] KEELC 2603 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 39 OF 2021
GMA ONGONDO, J
JULY 20, 2022
(FORMERLY MIGORI ELC OS NO. E019 OF 2020)**

BETWEEN

**MICHAEL OGWENO MBOGO 1ST PLAINTIFF
JACKTON KOLO MUGA 2ND PLAINTIFF
ALPHONSE ONYANGO MBOGO 3RD PLAINTIFF
PETER OTIENO MBOGO 4TH PLAINTIFF**

AND

**PETER ALBERT ODUOR 1ST DEFENDANT
SILAS ONYANGO ODHIAMBO 2ND DEFENDANT**

JUDGMENT

1. On 30th January, 2007, the plaintiffs, through Ouma O. J. Omondi & Company Advocates, filed the present suit by way of an Originating Summons of even date, pursuant to Order 36 Rules 3 and 3A of the *Civil Procedure Rules*, 2010 (the Rules herein), Sections 7, 37 and 38 of the Limitations of Actions Act Chapter 22 Laws of Kenya and Sections 28 and 30 of the Registered Lands Act Chapter 300 Laws of Kenya (Repealed Act).
2. Together with the Originating Summons, the plaintiffs filed an application by way of a Notice of Motion dated 30th January, 2007 pursuant to Sections 3A, 63 (c) and (e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya (The CPA herein). The plaintiffs sought four orders including an order of inhibition restraining any dealing with the suit land, to wit, Kabondo/Kakangutu East/853 until the determination of the instant suit.



3. The honourable court certified the application as urgent on 2nd February, 2007 and directed the plaintiffs to serve the then defendant (1st defendant). The matter was then fixed for inter partes hearing on 3rd May 2007. However, when the application came up for hearing on the said date, the plaintiffs failed to adduce any evidence showing that the defendant had been served hence the honourable court dismissed the same.
4. On 14th March 2011, the plaintiffs, through M/S Oguttu-Mboya & Company Advocates, filed an amended Originating Summons of even date, pursuant to leave of the court granted on 28th February, 2011. The same was lodged under Order 37 Rules 1 and 3 of the Rules (supra), Sections 1A, 1B and 3A of the CPA, Sections 7, 37 and 38 of the Limitation of Actions Act (supra) and Section 30 of the Repealed Act.
5. The plaintiffs sought the orders infra:
 - a) A declaration that the defendants' rights to recover the whole of the suit land is barred under the Limitations of Actions Act, Chapter 22 Laws of Kenya, and their title thereto extinguished on the ground that the plaintiffs have openly, peacefully and continuously been in occupation and possession of the suit land for a period exceeding 12 years.
 - b) An order that the plaintiffs be registered as proprietors of the whole of the suit land, in place of the defendants, more particularly the 2nd defendant, who currently holds the title of the suit land.
 - c) An order restraining the defendants by themselves, agents, servants and/or employees from interfering with the plaintiffs' peaceful possession and occupation of the suit land, in any manner whatsoever and/or howsoever.
 - d) Costs of this originating summons be borne by the defendants.
 - e) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
6. The amended originating summons is anchored on a twenty-six (26) paragraphed supporting affidavit of the 2nd plaintiff annexed thereto. The gist of the plaintiffs' case is that they have acquired by adverse possession, the suit land thus the 1st defendant lacked the legal right to transfer the suit land to the 2nd defendant. That as a result, the 2nd defendant did not acquire a valid title in respect to the suit land. The plaintiffs aver that the said transfer was effected on 21st April, 2010 yet the plaintiffs have been in possession of a portion of the suit land measuring approximately 2 acres for a period exceeding 12 years, beginning in the year 1995.
7. The plaintiffs contend that the suit land was initially registered in the name of one Ibrahim Harrison Kayo (deceased), who used to cultivate a portion of the suit land, whilst the plaintiffs' father and uncle namely Elishapan Muga Obala and Samwel Mbogo Obala respectively, both occupied and cultivated a portion thereof, measuring 1.5 acres.
8. That both Elishapan Muga Obala and Samwel Mbogo Obala vacated the suit land in 1975 but in the year 1995, Elishapan Muga Obala (the plaintiffs' father) returned to the suit land, together with the plaintiffs, and erected a homestead and occupied a portion of the suit land measuring approximately 2 acres thereof. That the plaintiffs still occupy the said portion to date.
9. The plaintiffs aver that such occupation was with the knowledge of the deceased, Ibrahim Harrison Kayo. Upon his demise in 2001, the 1st defendant who was the administrator of the deceased's estate,



- requested the plaintiffs to help offset a loan facility with National Bank of Kenya Limited to enable the title deed of the suit property which was charged in favour of the said bank to be discharged.
10. That the plaintiffs made various payments to the said bank to facilitate discharge of the title to the suit land, which was to be transferred to them upon completion of payment. However, the 1st defendant went ahead to procure the title to the suit land which he then sold to the 2nd defendant, thereby transferring title to the suit land to the 2nd defendant.
 11. The plaintiffs urged the court to find that their occupation of the suit land have been adverse to the defendants' rights to the same. That their interest over the suit land merits registration.
 12. The 2nd defendant, through G. M. Nyambati & Company Advocates, filed a Replying Affidavit sworn on 5th April 2011 on even date opposing the suit. He deposed in part that he is the registered owner of the suit land, having obtained title thereto on 21st April 2010. He further stated that the transfer and registration of title to the suit land in his name was confirmed to be in order by the court vide the ruling rendered by Hon. Justice D. Musinga (now, JA) on 21st September, 2010. He also denied that the plaintiffs have been in occupation of the suit land for a period exceeding 12 years as claimed in the amended Originating Summons.
 13. In response to the originating summons dated 30th January, 2007, the 1st defendant filed a Replying Affidavit sworn on 22nd June 2007. He admitted that both the plaintiffs and the 2nd defendant had assisted in servicing the loan facility in which the title to the suit land was charged. He also admitted that the plaintiffs have been in occupation of the suit land. He, thus proposed that the suit land be shared between the plaintiffs and the 2nd defendant, but if the 2nd defendant disagrees then he should avail proof of his loan repayments so that he can be refunded the money by the plaintiffs who are already in occupation and use of the suit land.
 14. The 2nd defendant filed an application by way of Notice of Motion dated 2nd November 2011 seeking an order of injunction restraining the plaintiffs from their continued forceful entry and cultivation and or excavation of bricks thereby wasting the suit land. The plaintiffs opposed the application by way of a Replying Affidavit sworn on 30th November, 2011 and filed on 1st December, 2011. This application was disallowed and the same dismissed with costs to the plaintiffs by the court (Honourable S. Okong'o J) through a ruling delivered on 7th November, 2013.
 15. The matter proceeded by way of viva voce and affidavit evidence.
 16. PW1, Jackton Kolo Muga, testified on 27th October, 2015, inter alia, that they have been in continuous occupation of the suit land since 1995 and nobody has interfered with the said possession and occupation. That they assisted to service the loan facility to National Bank of Kenya Limited to avoid auction of the suit land after they were requested by a brother to the 1st defendant, one Shem Kayo (deceased). PW1 averred that they have established a homestead in the suit land and they also have a banana plantation, avocado, sweet potatoes and keep cows thereon.
 17. PW1 urged the court to have the suit land registered in the names of the plaintiffs and be awarded costs of the suit. PW1 produced a bundle of documents to wit Copy of the certificate of official search in respect of L. R. No. Kabondo/Kakangutu/East/853 dated 5th January, 2005, Copy of the certificate of official search in respect of L. R. No. Kabondo/Kakangutu/East/853 dated 3rd May, 2007, Copy of the certificate of official search in respect of L. R. No. Kabondo/Kakangutu/East/853 dated 21st April, 2010, Copy of the certificate of official search in respect of L. R. No. Kabondo/Kakangutu/East/853 dated 22nd April, 2010, Bundle of deposit slips, Copy of the letter of consent dated 28th November, 2006, Copy of the ruling dated and delivered on 7th November, 2013, Copies of the photographs



- showing the homesteads of the plaintiffs on the suit land, Pleadings, affidavits and all other documents filed in respect of the instant suit (PExhibits 1 to 8 respectively).
18. On cross-examination, PW1 stated that he was not aware that the 2nd defendant had also remitted funds to National Bank Kenya Limited for settlement of the outstanding loan to which the suit land was charged. He also denied colluding with the 1st defendant to prevent the 2nd defendant from obtaining transfer of the suit land.
 19. On the 15th May, 2017 Hon. Mutungi J. ordered and directed that the instant suit be transferred from Environment and Land Court at Kisii where it had been proceeding to the Environment and Land Court at Migori since the land, the subject matter of the suit is situated within the jurisdiction of the latter.
 20. DW1, Silas Onyango Odhiambo, testified on 4th March 2021. He relied on his replying affidavit sworn on 5th April 2011 and filed in court on even date, which was adopted by the court. He deposed, inter alia, that he purchased the suit land measuring approximately 2.6 Ha in area on 15th January, 2003 from one Shem Kayo (deceased), who is a brother to the 1st defendant. That the transfer of the title to him was effected in 2004. He produced a copy of the certificate of official search in respect of L. R. No. Kabondo/Kakangutu/East/853 dated 22nd April, 2010 which was admitted as 2nd DExhibit 1.
 21. When the matter came up on 30th September 2021 for further hearing of the defendant's case, the court (Hon. Kullow J.) directed that the matter be transferred to this court as the suit was part heard and the suit land is situated within the jurisdiction of this court.
 22. The matter proceeded in this court on 23rd November, 2021 with further hearing of the defence case. DW2 was cross-examined and denied that the plaintiffs have been in occupation of the suit land since 1995.
 23. Learned counsel for the plaintiffs filed submissions dated 4th February 2022 on 7th February 2022. Counsel identified three (3) issues for determination thus: whether the plaintiffs' occupation and/or use of the suit land has been open, continuous and uninterrupted and if so, the duration of occupation; whether the plaintiffs' occupation and/or possession of the suit land meets the threshold for declaration of adverse possession and whether the 1st defendant had the capacity to transfer the suit land in favour of the 2nd defendant after lapse of 12 years.
 24. Counsel submitted, inter alia, that the plaintiffs have proven their claim of occupation of the suit land from 1995 to 2001 when Ibrahim Harrison Kayo passed on, was not challenged by the defendants.
 25. Learned counsel relied on various authorities, to wit, *Celina Muthoni Kitbinji –vs- Safiya Binti Swaleh & 8 others* (2018) eKLR, and *Kiprono Arap Chepkwony –vs- Bornes Taprandich Barmalel & Another* (2019) eKLR, to buttress his submissions.
 26. The defendants did not file submissions herein.
 27. From the foregoing, the issues for determination herein are thus:
 - a. Whether the plaintiffs have proved their case to warrant grant of the orders sought in this suit; and
 - b. Who should bear the costs of this suit?
 28. The 2nd defendant stated that he purchased the suit land in 2003 from one Shem Kayo (deceased), a brother to the 1st defendant herein. He, however, did not produce in evidence a copy of the sale agreement in respect to the alleged transaction.



29. A perusal of the record herein indicates that the 2nd defendant was registered as proprietor of the suit land at the instance of a court order issued on 3rd December, 2009 in Kisumu Chief Magistrate's Court Miscellaneous Civil Case No. 41 of 2007 (OS). The order was generated through an application filed by the 1st defendant on 31st August, 2007, being aware of the instant suit having entered appearance on 20th June 2007. The court noted that the defendant may not have disclosed the existence of the instant suit before that court.
30. Vide an application dated 4th June, 2010, the plaintiffs sought various orders including, an order to rescind, annul or revoke the transfer and registration of the suit land in the name of the 2nd defendant herein and an order restoring the inhibition on the suit land that was granted vide an order made on 28th June, 2007.
31. In the ruling pointed out at paragraph 12 hereinabove, the court declined to revoke the transfer and registration of the suit land in the name of the 2nd defendant. The honourable court, instead, directed that the District Land Registrar, Rachuonyo be ordered to explain the circumstances under which he removed the inhibition that was registered on the suit land on 27th July, 2007. The District Land Registrar, Rachuonyo was to be served with the application, after which he would put in his Replying Affidavit. Thereafter, the court would make further orders regarding the plaintiffs' application.
32. The court further held that the consent order of inhibition issued on 28th June, 2007 was fraudulent as the 1st defendant failed to disclose material facts.
33. In the said ruling, the honourable court noted that the 2nd defendant purchased the suit land for a sum of KES 270,000 in 2006 and obtained the consent of the Land Control Board to effect transfer in his name. The 2nd defendant then paid stamp duty for the transfer on 12th February, 2007 but transfer was not effected then.
34. When the matter came up for mention for further orders on 28th February, 2011, parties no longer wished to have the District Land Registrar, Rachuonyo file his affidavit. Thus, the requirement that the District Land Registrar, Rachuonyo do file an affidavit, was dispensed with and the outstanding prayers in respect of the Notice of Motion dated 4th June, 2010, were abandoned.
35. 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- Kahindi Ngala Mwangandi* (infra), amongst other authoritative pronouncements.
36. Section 7 of the *Limitation of Actions Act* stipulates that 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
“.
37. At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law. Section 38 of the *Limitation of Actions 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.



38. 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....”
39. Similarly, 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. ”
40. The ingredients in respect of adverse possession 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.”
41. In the case of *Titus Ong’ang’a Nyachico v Martin Okioma Nyauma & 3 others* [2015] eKLR, the honourable court cited *Kimani Ruchine & Another vs. Swift, Rutherford Co. Ltd & Another* [1976-80] 1KLR 1500 where Kneller J. stated further that:
- “...Possession can take different forms such as fencing or cultivation...”
42. In *Gatimu Kinguru v Muya Gathangi* [1976] eKLR the honourable court stated thus:
- “...planting a boundary of tufts of napier grass is the best evidence of adverse possession like fencing off, and cultivation of land even without fencing off has been held sufficient to prove adverse possession (see 24 Halsbury’s Laws of England (3rd Edn) page 252)...”
43. It is also well settled 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; see *Ruth Wangari Kinyagia –vs- Josephine Muthoni* (2017) eKLR.
44. The plaintiffs have asserted that they have been in occupation of the suit property from 1995. The instant suit was instituted in 2007 hence 12 years period come into play as noted in Salim case (infra).
45. The plaintiffs averred that they have been in possession of the suit property openly and continuously and without interruption for all that period; see *Salim –vs- Boyd* (1971) EA 550.
46. There was no evidence availed to contradict the plaintiffs’ averments. It is steadfast and treated as gospel truth.
47. In fact, the 1st defendant himself admitted vide his Replying Affidavit sworn on 22nd June 2007 that the plaintiffs have been in occupation of the suit land. That both the plaintiffs and the 2nd defendant had assisted in servicing the loan facility in which the title to the suit land was charged.



48. The 1st defendant then proceeded to propose that the suit land be shared between the plaintiffs and the 2nd defendant. That in the event the 2nd defendant disagrees then he should avail proof of his loan repayments so that he can be refunded the money by the plaintiffs who are already in occupation and use of the suit land.
49. It is a settled law 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 and *Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another* (2015) eKLR.
50. The plaintiffs produced a copy of the official search certificate for the suit land confirming that the same is registered in the 2nd Defendant’s names under the repealed Act; see *Wainaina –vs- Murai and others* (1976-80) 1KLR 283 at 289/290.
51. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the plaintiffs have proved their case on a balance of probability. Indeed, they have brought themselves within the limits of the doctrine of adverse possession.
52. In the result, the suit by way of an amended originating summons dated 14th March 2011 and duly filed on even date be and is hereby allowed.
53. I proceed to enter judgment for the plaintiffs as per prayers 5, 6, 7 and 8 on the face of it and as listed in paragraph 5(a), (b), (c) and (d) hereinabove.
54. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 20TH DAY OF JULY 2022.

G.M.A ONG’ONDO

JUDGE

Present

1st and 2nd defendants

Mr. D. Adawo holding brief for M/S W. Ochwal, learned counsel for the plaintiffs

Angela and Fiona, Court Assistants

