



**Ogola & another v Rapemo (Environment & Land Case
E006 of 2021) [2022] KEELC 2604 (KLR) (19 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E006 OF 2021**

GMA ONGONDO, J

JULY 19, 2022

BETWEEN

MAURICE ARANDA OGOLA 1ST PLAINTIFF

ODIAGA OGOLLA 2ND PLAINTIFF

AND

CLEMENT OURE RAPEMO DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Kochia/Korayo/229 measuring approximately zero decimal four two hectares (0.42 Ha) in area (The suit land herein). The same is contained in Map Registry Sheet number 3 and located within Homa Bay County.
2. The two plaintiffs are represented by the firm of Nyauke and Company Advocates.
3. The defendant is unrepresented in this suit.
4. On May 9, 2022, pursuant to Order 37 rules 18 and 19 of the *Civil Procedure Rules*, 2010, the court directed, *inter alia*; that the originating summons dated 21st November 2021 be treated as a plaint herein. That the suit be heard by way of *viva voce* evidence.

B. The Gist of Plaintiffs' Case

5. The plaintiffs commenced the suit by way of the originating summons pointed out in paragraph 4 hereinabove and duly lodged in court on 1st December 2021 seeking the following orders;
 - a) That the Honourable court be pleased to make a finding and final judgment that the applicants have acquired the suit land adversely.



- b) That the honourable court thus be pleased to order that land the suit land currently occupied and cultivated by the applicants be registered into the name of the 1st applicant.
- c) The cost of this originating summons be provided for in favour of the applicants.
6. The originating summons is premised on the 1st plaintiff's supporting affidavit of thirteen paragraphs sworn on even date on behalf of the 2nd plaintiff as well as himself and annexed thereto. There originating summons is further premised upon grounds I to VII listed on the face of the same.
7. In a nutshell, the plaintiffs' claim is that they have been in continuous, peaceful and uninterrupted occupation of the suit land for over fifty years. That they have buried the 1st plaintiff's father, Mr Patrick Ogola Ombero and their brothers, among others, on the suit land. That if the defendant at some point opts to evict them from the suit land, they run a risk of losing their only property they have known as their abode the whole of their lives.
8. The 1st plaintiff (PW1) testified that the defendant is his village mate. He referred to his statement, the originating summons, the supporting affidavit and relied on a certificate of official search as per list of documents dated 30th November 2022 serial number 1 (PExhibit 1). He stated that he is claiming ownership of the suit land by adverse possession. That the same is registered in the name of the defendant who lives away at Lambwe Valley Settlement Scheme. That he was born and raised thereon.
9. The 2nd plaintiff (PW2) relied on her statement recorded on December 1, 2021 as part of her testimony. She also testified that she is a widow aged 83 years and lives on the suit land. That her deceased husband, Ogolla Patrick was buried thereon. That the defendant who is from her clan, stays at Lambwe.
10. By their submissions dated June 22, 2022, the plaintiffs stated that they claim adverse possession over the suit land registered in the name of the defendant who lives elsewhere, Lambwe Valley Settlement Scheme. That they have lived on the suit land for over fifty years without any interference of the defendant. That the plaintiffs have no other alternative place or land parcel to their name. Learned counsel for the plaintiffs cited Court of Appeal Civil Appeal No. 11 of 2016: [*Richard Wefnafuna Songey-vs-Benard Mynyifwa Songol*](#), to buttress the submissions.

C. The Gist of the Defendant's Case

11. The defendant was duly served as disclosed in the affidavits of service sworn on May 6, 2022 and June 20, 2022 herein by Mr Samwel Nyauke, learned counsel for the plaintiffs. Therefore, he was made aware of this suit as I subscribe to the Court of Appeal decision in the case of [*Ogada-vs-Mollin*](#) (2009) KLR 620.
12. Be that as it may, the defendant failed to enter appearance and or file any response to the originating summons.

D. Issues For Determination

13. 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.
14. I have duly considered the entire originating summons, the testimonies of PW1, PW2 and the plaintiffs' submissions alongside the fact that the defendant failed to defend the suit. Therefore, 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.

E. Discussion and Determination

15. It must be noted that the plaintiffs' claim is for the whole of area of the suit land as shown in PART A-Property Section of PEExhibit 1 and as stated at paragraph 1 hereinabove; see *Muthuita-vs-Wanoie and 2 others* (2008) 1 KLR (G & F) 1024.
16. On the issue of registration, PW1 and PW2 stated that the suit land is registered in the name of the defendant. Clearly, PW1 testified that;

“The defendant is registered as proprietor of the suit land.”
17. PEExhibit 1 reveals that the defendant is the proprietor of the suit land with effect from January 5, 2005. Notably, the suit land is registered under the *Registered Land Act* Chapter 300 Laws of Kenya (Repealed) as observed Simpson J (As he then was) in the case of *Wainaina-vs-Murai and others* (1976-1980) 1 KLR 283 at 289/290 and in line with *Kazungu Katana case* (*supra*).
18. As regards open and exclusive possession of the suit land, PW1 testified in part;

“...where I was born and raised...”
19. It is the plaintiffs' assertion that that they are in cultivation of the suit land. This is discerned on ground III of the originating summons and the statements of PW1 and PW2 herein.
20. It is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
21. Regarding the third dictate, PW1 stated that he is fifty years and that PW2 is his mother. That lives on the suit land where he was born and occupies the same to date. That the defendant has not shown any interest to evict them from the suit land.
22. PW2 stated that since she got married to her late husband, Patrick Ogola Ombero, she has sired and raised all her children who are now adults thereon. Her statement which is part of her testimony, reads;

“.....That is the only place I have known as home.....”
23. It is the plaintiffs' contention that the defendant is aware of their occupation of the suit land which they have known as their home for over fifty years but he is he is unbothered thereof. So, the defendant with knowledge of the plaintiffs' possession of the suit land, has not taken any steps to interrupt their quiet possession of the same.
24. 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*).
25. In *Kirugi and another-vs-Kabiya and 3 others* (1987) KLR 347 the burden was always on the plaintiff to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof.



26. The instant suit was heard by way of formal proof. The testimonies of PW1 and PW2 are unchallenged and quite cogent in regard to adverse possession claim over the suit land.
27. The plaintiffs have been in peaceful and continuous enjoyment and use of the suit land in excess of fifty years (see *Halsbury's Laws of England* 3rd Edition paragraphs 481 and 482 at pages 251 and 252). The defendant who stays elsewhere has been dispossessed thereby.
28. It is therefore, the finding of this court that the plaintiffs have proved their claim against the defendant on a balance of probabilities. They are entitled to the orders sought in the originating summons.
29. Accordingly, I enter judgment for the plaintiffs against the defendant in terms of orders 1, 2 and 3 sought on the face of the Originating summons and as stated in paragraph 5 (a), (b) and (c) hereinabove.
30. It is so ordered.

DELIVERED, SIGNED AND SIGNED AT HOMA BAY THIS 19TH DAY OF JULY, 2022

G.M.A ONG'ONDO

JUDGE

PRESENT

Plaintiffs

Ms. Odera, learned counsel for the plaintiffs

Okello, Court Assistant

