



Khnyelesi & another ((Suing as The Legal Administrators of The Estate of JOSHUA ANDALA MASINGILA - (Deceased)) v Nasipwondi (Environment & Land Case 156 of 2016) [2022] KEELC 12772 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 156 OF 2016
BN OLAO, J
SEPTEMBER 28, 2022**

BETWEEN

ROBAI ANDALA KHNYELELI 1ST PLAINTIFF

JOSHUA ANDALA MASINGILA 2ND PLAINTIFF

(SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF JOSHUA ANDALA MASINGILA - (DECEASED))

AND

MARITA NASIPWONDI DEFENDANT

JUDGMENT

- 1 The land parcel No Bungoma/kiminini/237 (the suit land) has since September 18, 1997 been registered in the names of Joshua Andala Masingila (the deceased) who passed away on April 28, 2018 and has since been substituted with Robai Andala Khanyelesi and Tom Andala Masingila (the plaintiffs).
- 2 By an amended plaint dated March 9, 2020, the plaintiffs sought judgment against Marita Nasipwondi (the defendant) in the following terms: -
 - (a) A declaration that the plaintiffs lawfully possess and use the land parcel No Bungoma/kiminini/237.
 - (b) A mandatory order instructing the defendant to exhume the body of David Isaac Watima from the land parcel No Bungoma/ Kiminini/237.
 - (c) A permanent injunction restraining the defendant, her servants and/or agents from trespassing upon or in any other way interfering with the plaintiffs' use and possession of the land parcel No Bungoma/ Kiminini/237.



(d) Costs of this suit.

(e) Any other relief this honourable court deems fit and just to grant.

3 The basis of the plaintiffs' suit is that at all material time, the deceased was the owner of the suit land. However, on December 3, 2016, the defendant encroached onto the suit land, put up structures and buried thereon one David Isaac Watima without the plaintiffs' permission. Efforts to stop the burial were fruitless.

4 That the actions of the defendants are unlawful and infringe upon the plaintiffs' rights. The suit land has been the subject of previous litigation in Civil Case No 84 of 1974.

5 Together with the amended plaint, Tom Andala Masingila the 2nd plaintiff filed a statement also dated March 9, 2020 in addition to the one filed by the deceased together with the original plaint dated December 7, 2016.

6 In his statement, the 2nd plaintiff states that the deceased who was his father was the owner of the suit land since 1965 having full control and use thereof. However, since he was elderly and sick, the deceased left a care – taker to stay on the land while he went to stay in Kakamega to enable him access proper care and attention.

7 On December 1, 2016 at about 10 p.m, the plaintiffs received information that some intruders had encroached the suit land and were planning to bury someone thereon. The deceased travelled to Kiminini the next morning but could not access the suit land due to the presence of a hostile crowd wielding pangas and machetes. He however reported the incident to the area Chief at MUNYOFU who advised him to obtain court order restraining the defendant from burying her son on the suit land. The deceased managed to instruct his advocate at 6 pm but it was too late to get a court order. The deceased's advocate however managed to write a demand letter to the defendant which was ignored leaving the deceased with no option other than filing this suit.

8 Prior to his demise on April 28, 2018, the deceased had filed this suit on December 7, 2017 together with a statement whose contents are similar to those of the statement by Tom Andala Masingila. The deceased had also filed the following documents in support of his case: -

1. Title deed for the land parcel No Bungoma/kiminini/237.
2. Letter dated December 3, 2016 from Assistant Chief Kiminini.
3. Demand letter from the deceased's advocate.

Having obtained a limited grant of letters of administration in Bungoma Chief Magistrate's P & A Cause No 360 of 2019, the plaintiffs further filed the said grant authorizing them to prosecute this suit.

9 The defendant filed an amended defence and counter – claim dated July 28, 2021 in which she pleaded, *inter alia*, that although the deceased was the owner of the suit land, his right thereto had been extinguished by the doctrine of adverse possession. She denied having buried David Isaac Watima on the suit land stating that by custom, that was the reserve of the clan and family which is dominated by males. She therefore pleaded that the suit has been directed to a wrong entity and denied having trespassed on the suit land or infringed upon the plaintiffs' Constitutional rights. She also pleaded that the decree in Civil Suit No 84 of 1974 could not be enforced due to effluxion of time.



10 In her counter – claim, the defendant averred that she and her family have lived, occupied and utilized the suit land openly and uninterrupted for a period of over 12 years and she has therefore acquired the same by way of adverse possession.

11 The defendant therefore sought Judgment against the plaintiffs in the following terms: -

1. A declaration that the plaintiffs’ right over the suit land has, upon the expiry of 12 years, been extinguished and that the defendant has acquired the suit land by way of adverse possession.
2. That the register of title be rectified to read the name of the defendant.
3. Costs.

The defendant did not file any documents but she filed a statement dated March 20, 2017 and filed on April 5, 2017 in which she denied the averments in the plaint. She added that she did not bury the deceased (in this case David Isaac Watima) on the suit land. Further, that as a woman, she could not dictate where David Isaac Watima was to be buried as that is the reserve of men. She therefore prayed that the suit be dismissed as she has been wrongly sued.

12 The case was heard on June 28, 2022 and Tom Andala Masingila (PW 1) was the only witness who testified on behalf of the plaintiffs. He adopted as his evidence his statement dated March 9, 2020 and produced as his documentary evidence the documents filed on December 7, 2016 by the deceased and the further list of documents filed on March 9, 2020.

13 By consent of both Ms Kesei Counsel for the plaintiffs and Mr Okaka holding brief for Mr Wafula for the defendant, the parties produced as part of the plaintiffs’ documentary evidence the order issued in Eldoret High Court Appeal No 9 of 1975.

14 Both parties filed submissions to which were annexed their respective authorities.

15 I have considered the evidence by Tom Andala Masingila (PW 1) who is the only witness who testified as well as the submissions by counsel.

16 It is the plaintiffs’ case that the defendant unlawfully encroached onto the suit land on December 3, 2016 where she buried the body of her kin David Isaac Watima thus infringing upon the plaintiffs’ rights to the suit land.

17 And although the defendant has pleaded that she has been wrongly sued since the burial was conducted by men. She nonetheless filed a counter – claim seeking orders that she is infact entitled to be registered as the proprietor of the suit land by way of adverse possession and that the plaintiffs’ right thereto have been extinguished.

18 The plaintiffs filed a reply to the amended defence and a defence to the counter – claim. They reiterated the averments in their plaint that the deceased was the owner of the suit land on which the defendant illegally encroached on December 3, 2016.

19 The plaintiffs joined issues with the defendant and denied the allegations in the counter – claim describing them as mere afterthoughts to be struck out.

20 I have identified the following as the issues to be determined by this court: -

1. Whether the plaintiffs have any interest in the suit land.
2. Whether the defendants encroached onto the suit land in 2016 by burying her kin thereon.



3. Whether in fact the plaintiffs' right. If any, on the suit land was extinguished and the defendant is entitled to be registered as the proprietor thereof by way of adverse possession.
4. What disposal orders should this court make.

It is common ground that the plaintiffs are the administrators of the Estate of Joshua Andala Masingila (the deceased) who prior to his demise on April 28, 2018 was the registered proprietor of the suit land. A copy of the title deed issued on September 18, 1997 in the deceased's name was part of the documents filed herein. Therefore, as the administrators of the estate of the deceased, the plaintiffs have the necessary locus standi to file this suit to protect the suit land for the benefit of that estate.

- 21 As to whether the defendant encroached onto the suit land and unlawfully buried the body of David Isaac Watima thereon, the defendant did not testify to rebut the plaintiffs' testimony. She has been content with the defence and counter – claim where she has pleaded, inter alia, that she has been wrongly sued since burials are the preserve of men. The plaintiffs on the other hand have through the evidence of Tom Andala Masingila (PW 1) testified how the defendant encroached onto the suit land and buried the body of David Isaac Watima thereon on December 3, 2016 notwithstanding protests from the plaintiffs who were not able to get a court order in good time to stop the burial. The plaintiffs did not clarify in their testimony what the relationship was between the late David Isaac Watima and the defendant. Further, the defendant did not in her statement indicate what her relationship was with the late David Isaac Watima. However, from the submissions by the defendant's own counsel on that issue, and which I have no reason to doubt, the defendant is a widow of the late David Isaac Watima. This is what counsel has submitted in paragraph C of his submissions: -

“That the defendant herein has been sued in capacity as widow/next of kin of the estate of David Isaac Watima (deceased).”

The defendant has of course not been sued in that capacity because as at the time of his death, her late husband had no interest in the suit land. But that submission nonetheless clarifies her relationship with the late David Isaac Watima.

- 22 As to whether there was any encroachment by the defendant on the suit land by burying the body of the late David Isaac Watima on the suit land, the defendant has in paragraph 5 of her defence denied that allegation and put the plaintiff to strict proof thereof. Apart from his oral testimony as contained in his statement, Tom Andala Masinjila (PW 1) also produced a letter from his Assistant Chief dated December 3, 2016. Due to its relevance, I shall cite it in extensor. It reads: -

“To Whom It May Concern

Re: Mr Joshua Andala Masingila

The above named is a resident of this location of plot 237 KNW/BGM.

Purpose of this letter is to confirm that the family of the late Isaac Watima buried their late son David Watima in his plot mentioned above on Saturday December 3, 2016 without his consent (sic) according to him.

Kindly accord him the needful.”

The defendant's relationship with the late David Isaac Watima and the fact that he was buried on the suit land belonging to the deceased is not really in doubt. The defendant has pleaded in paragraph 5 of her defence that the burial was “a reserve of the clan and family



which is dominated by males.” However, as the wife of the late David Isaac Watima (as submitted by her own counsel) she is part of that family. Indeed, if the court may borrow from succession proceedings, as a surviving spouse, the defendant ranks very high. What is important, however, is that the defendant having elected not to testify in these proceedings, the plaintiffs’ evidence is not rebutted and her pleadings alone cannot support her case nor dislodge the plaintiffs’ cogent evidence. This is what Madan J (as he then was) had to say on the role of pleadings in the case of *CMC Aviation Ltd v Kenya Airways Ltd (cruisair Ltd)* 1978 KLR 103: -

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of ‘evidence’ in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of ‘evidence’ in *Casell’s English Dictionary* Pg 394: -

‘Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident or renders evident to the mind that it is truth.’”

The Judge went on to add as follows: -

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence.

Evidence is usually given on oath. Averments depend upon evidence for proof of their contents.” Emphasis mine.

The defendant did not testify and therefore the plaintiffs’ evidence that the defendant encroached onto the suit land on December 3, 2016 and buried the body of David Isaac Watima thereon must be believed by this court as the correct account of what transpired on that day. There is nothing to suggest that as at the time when the body of David Isaac Watima was being buried on the suit land, either he, the defendant or any member of his clan or family had any interest therein. As the registered proprietor of the suit land, the deceased enjoined all the rights and privileges conferred under sections 27 and 28 of the repealed *Registered Land Act* under which the title thereto was issued. Those rights and privileges include the right to eject any trespassers therefrom. Similar provisions exist in the new *Land Registration Act*. The deceased was therefore the absolute and indefeasible owner of the suit land a right which the plaintiffs are now pursuing. I am therefore satisfied that by interring the remains of the late David Isaac Watima on the suit land on December 3, 2016, the defendant and all those acting with her were encroaching on the suit land without the consent of the deceased.

- 23 The defendant however filed a counter – claim seeking orders that in fact she has acquired the suit land by way of adverse possession and should be registered as the proprietor thereof instead of the deceased. Her counsel submitted in paragraphs D to R of his submissions that not only is the plaintiff’s suit



res – judicata but further, that the defendant is entitled to the suit land by way of adverse possession. counsel has submitted as follows in paragraph D of those submissions: -

“The common thread that runs through the testimony of the evidence by the plaintiff is that one David Isaac Watima and the defendant have at all material times been staying on the parcel of land title number Bungoma/kiminini/237 since the year 1974 and set up homestead and even cultivated the suit property. That the plaintiff did not bother to proceed to execute the decree issued to him for a period of over 12 years and thus granting the defendant and the entire estate of David Isaac Watima the right to adverse possession.”

Perhaps this is now the right time to refer to the decree and eviction order issued in the High Court Of Kenya at Eldoret in Civil Appeal No 9 of 1975 between Isaac Watima as appellant and Joshua Masinjila as respondent. Both documents, as I have already stated earlier in this judgment, were produced with the consent of the parties on June 28, 2022. I shall only quote paragraph 2 of the decree which is relevant for purposes of this judgment and reproduce the whole of the eviction order.

“Isaac Watima – appellant

Joshua Watima Masinjila – respondent

decree

This appeal coming for hearing for hearing (sic) before justice Mead sitting at Eldoret on the January 30, 1980 and a consent order having been entered, it was decreed and ordered that: -

1. –
2. The defendant/appellant to vacate the land the subject matter of this claim that is plot No 237 Kiminini Settlement Scheme within three months of the date of payment by the respondent to the appellant of the said sum of Kshs 2,450/= and the handing over by the respondent to the appellant of the sewing machine.”

No doubt Isaac Watima defaulted in complying with the above decree because on November 25, 1981, the following eviction order addressed to the officer in charge Kitale Police Station was issued against him: -

“Eviction order

Whereas Isaac Watima by the order of this court dated January 30, 1980 was ordered to vacate from plot No 237 Kiminini Settlement Scheme and Whereas the respondent one Joshua Masinjila has complied with all the terms of the decree, the appellant Isaac Watima has on the contrary refused to move away and thus, you are hereby directed to remove the said Isaac Watima together with his agents, servants or any belongings and any person bound by the said decree who may refuse to vacate from the said plot.

For so doing shall be sufficient warrant and authority.

Given under my hand and SEAL of this court this November 25, 1981.

J L A Osiemo Esq

Deputy Registrar

Eldoret.”



The pleadings and the judgment in the case that gave rise to Eldoret High Court Civil Appeal No 9 of 1975 were not availed to this court. All that this court was informed by Counsel was that the appeal arose out of Case No 84 of 1974 in the subordinate court and when I enquired about them, MS KESEI informed me that the plaintiff did not see the need to produce them. That being the position, this case is not able to determine whether, as submitted by counsel for the defendant, this suit is *res – judicata*. The onus is on the party pleading *res – judicata* to provide evidence to prove that allegation. That has not been done by the defendant.

24 Most importantly, however, it is clear from the plaint that the plaintiff’s case is founded on trespass to the suit land. This is what they have pleaded in paragraph 5 of the amended plaint.

5 “The plaintiffs aver that on or before December 3, 2016, the defendant illegally encroached onto the deceased plaintiff’s piece of land and put up structures and buried the deceased David Isaac Watima on the aforementioned piece of land without the deceased plaintiff’s permission or authority.”

In view of the admitted fact that the High Court in Eldoret had in fact issued an eviction order against Isaac Watima as far back as November 25, 1981, his and his family’s continued presence on the suit land upto 2016 amounted to a continuous trespass. Such a trespass cannot be defeated by either the statute of limitation nor the doctrine of *res – judicata* because it arises from day to day so long as it continues. In the case of [Isaack Ben Mulwa v Jonathan Mutunga Mweke](#) C a Civil Appeal No 60 of 2015 MSA [2016 eKLR] the Court of Appeal described such a trespass in the following terms: -

“Each act of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be *res – judicata* simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

Therefore, even if the dispute that culminated in Eldoret High Court Civil Appeal No 9 of 1975 arose out of a claim of trespass to the suit land, the claim herein arose out of the trespass committed on December 3, 2016 when the defendant interred the body of David Isaac Watima on the suit land. That burial in 2016 could not have been the subject of a suit filed in 1975 and therefore the plea that this suit is *res – judicata* is not well founded and must be dismissed.

25 On the defendant’s counter – claim that she is entitled to the suit land by way of adverse possession, it was always going to be an up – hill task and clearly insurmountable task for her to prove that claim without leading evidence to demonstrate the key elements of a claim by adverse possession. For the defendant to prove that she is entitled to the suit land by way of adverse possession, she was required to satisfy the conditions set out in several precedents on that doctrine. For instance, in [Mtana Lewa v Kabindi Ngala Mwangandi](#) 2015 eKLR, the Court of Appeal stated thus: -

“Adverse possession is essentially a situation where a person takes possession of land and 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 is twelve (12) years. the process springs into action essentially by default or inaction of the owner. The essential



prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.” Emphasis mine.

The defendant also needed to prove that, as stated by Lord Hoffman in the case of *R v Oxfordshire Ex-Parte Sunningwell Parish Council* 1999 3 ALL ER 391, her occupation of the suit land is not by force, stealth nor license of the deceased i.e. “*nec vi nec clam nec precario*.” This has been followed in many decisions in this country including in *Kimani Ruchine v Swift Rutherford & Co Ltd* 1980 KLR 10.

26 The element of peaceful occupation of the land which a party claiming land by way of adverse possession was equally emphasized in *Grace Wairimu Soroma v Chaka Ltd & Others* 2017 where the Court of Appeal stated that: -

“What the applicant needed to prove was that her occupation was continuous, open and peaceful without the permission of the owner.” Emphasis mine.

I am emphasizing the issue of peaceful occupation because as is now clear, the High Court had as far back as November 25, 1981 issued an eviction order against Isaac Watima who had refused to vacate the suit land. That can only mean that the defendant and her family were in occupation of the suit land by force. In the circumstances, it is of no avail to the defendant even if her occupation of the suit land was well in excess of the statutory 12 years provided for in law to enable her acquire if by way of adverse possession. The fact that she and her family including David Isaac Watima have continued to occupy the suit land in defiance of orders to vacate as well as the eviction notice is a clear demonstration that her occupation is by force. And where occupation is forceful, it does not meet the threshold to warrant orders in adverse possession because it is not “*nec vi nec clam nec precario*.”

27 It is also not lost to this court that in her statement filed on April 5, 2017, the defendant has not even mentioned how she and her family entered the suit land and when. And since she did not testify, there was no opportunity to put those questions to her for clarification. All that the court is left with is her counsel’s submission is that she and the late David Isaac Watima have “been staying on the parcel of land title number Bungoma/kiminini 237 since the year 1974 and set homestead and even cultivated the suit property.” If that be the case, then it means that even if her occupation of the suit land was peaceful, it was interrupted on June 30, 1980 when by consent the late David Isaac Watima agreed to vacate it. By that time, she and her family had only occupied the suit land for 6 years. And by the time the eviction order was being issued on November 25, 1981, that occupation had only lasted 7 years. That was well below the statutory requirement of 12 years to entitle the defendant to orders in adverse possession.

28 It must be clear from the above that the defendant’s counter – claim seeking orders that she has acquired the suit land by way of adverse possession is lacking in merit and is for dismissal.

29 On the other hand, as the registered proprietor of the suit land, the deceased as the absolute and indefeasible owner was entitled to enjoy all the rights and privileges protected by such registration. Those include the right to eject trespassers therefrom. The defendant and her family fall within the category of such trespassers. The plaintiffs are therefore entitled to the orders sought in their plaint.

30 The up – shot of all the above is that having considered the evidence herein, there shall be judgment for the plaintiffs in the following terms: -

1. The defendant’s counter – claim is dismissed.



2. A declaration that the plaintiffs are entitled to the occupation and use of the land parcel No Bungoma/kabuyefwe/237.
3. A permanent order of injunction restraining the defendant, her servants and/or agents from trespassing upon or in any other way interfering with the plaintiff's use and possession of the land parcel No Bungoma/kabuyefwe/237.
4. A mandatory order is issued directing the defendant to exhume the body of David Isaac Watima from the land parcel No Bungoma/kiminini/237 within 30 days from the date of this Judgment. The exhumation be carried out under the guidelines to be issued by the Public Health Officer Bungoma.
5. In default of (4) above, the plaintiffs shall be at liberty to exhume the said body and bury it in a public cemetery at their cost also under the guidelines to be issued by the Public Health Officer Bungoma.
6. The defendant shall meet the plaintiff's costs of the suit and the dismissed counter – claim.

Boaz N. Olao.

J U D G E

28TH SEPTEMBER 2022.

JUDGMENT, DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28TH DAY OF SEPTEMBER 2022 BY WAY OF ELECTRONIC MAIL.

RIGHT OF APPEAL EXPLAINED.

Boaz N. Olao.

J U D G E

28TH SEPTEMBER 2022.

