



**Aketch (Suing as Legal Representative of the Late Jethro Akech Odongo) v Onyango
(Sued as the Administrator of the Estate of Joash Onyango Ochieng) (Environment and
Land Appeal 30 of 2021) [2022] KEELC 12701 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 30 OF 2021
GMA ONGONDO, J
SEPTEMBER 27, 2022
FORMERLY MIGORI ELC APPEAL NO. E028 OF 2021**

BETWEEN

**NARKISO OYUGI AKETCH (SUING AS LEGAL REPRESENTATIVE OF THE
LATE JETHRO AKECH ODONGO) APPELLANT**

AND

**ELIJAH ODHIAMBO ONYANGO (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF JOASH ONYANGO OCHIENG) RESPONDENT**

*(Being an appeal from the judgment of Hon. Tom Mark Olando, Principal Magistrate dated 5th
May 2021 in Homa Bay Chief Magistrate's Court Environment and Land case No. 63 of 2019)*

JUDGMENT

1. This appeal arose from the trial court's judgment rendered on 5th March 2021 where the learned trial magistrate, Honourable Tom Mark Olando held that the appellant, Narkiso Oyugi had failed to prove his case against the respondent, Elijah Odhiambo Onyango on a balance of probabilities. Thus, he dismissed the same with costs.
2. Being aggrieved by the trial court's decision, the appellant through the firm of Achillah T.O and Company Advocates and currently represented by the firm Oluoch Ammon and Company Advocates, generated the appeal by way of a memorandum of appeal dated 20th May 2021 based on nine grounds, inter alia;
 - a. That the Learned Magistrate erred in law and fact in holding that the plaintiff testified that his late father had several cases against the father of the Defendant including a case in the High Court without evidence of such suits.



- b. That the Learned Magistrate erred in law and fact in failing to consider for determination the issue of trust raised by the plaintiff in the Originating summons.
 - c. That Learned Magistrate failed to analyze and /or evaluate the facts evidence and submissions on record thereby arriving at a conclusion that was contrary to law and evidence.
3. Wherefore, the appellant is seeking the following orders;
 - a. The Appeal be allowed with costs.
 - b. The judgment be set aside and substituted with an order allowing the claim as per the Originating summons dated 25th November 2019.
 4. Originally, the appeal was filed at Migori Environment and Land Court. On 7th October 2021, it was transferred to this court for hearing and determination as envisaged under Articles 6 (3) and 48 of [the Constitution](#) of Kenya, 2010.
 5. The appeal was heard by way of written submissions further this court's directions of 15th February, 2022.
 6. By the submissions dated 21st March 2022 and filed on even date, learned counsel for the appellant stated, inter alia, that the learned trial magistrate failed to compile time from 1986 when time for claim of adverse possession started to run. That the court ignored the issues of trust raised in the originating summons and the decision of the Land Adjudication and settlement Tribunal which had divided the suit land, LR No. East Kanyada/Kanyadier/783 into two between the appellant and the respondent. So, counsel prayed that this this appeal be allowed with costs.
 7. In the submissions filed on 22nd June 2022 through the firm of Tom Mboya and Company Advocates, the respondent gave brief facts of the appellant's case as well as the respondent's case. It was submitted that the appellant filed Migori ELCC No. 559 of 2017 which was dismissed by the court for being res judicata on 26th May 2017. That earlier, the appellant filed objection number 822 of Kanyadier Land Adjudication section which was partially allowed. That subsequent appeal to the Minister was determined to the effect that the suit land was to remain in the name of Joash Onyango Achieng (Deceased) who was the father of the respondent.
 8. The respondent's counsel identified two issues for determination namely whether the appellant is entitled to the suit land by adverse possession and the party to pay the cost of the suit. In analyzing the issues against the appellant, counsel termed the appeal untenable as the appellant has failed to respect previous determinations on the same matter and implored upon the court to dismiss the same with costs. To reinforce the submissions, reliance was made on sections 7, 13, 16, 17 and 38 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya, section 28 (1) of the [Land Registration Act](#), 2016 (2012), the case of [Wambugu-vs-Njuguna](#) (1983) KLR 173 and the decision in [Mtana Lewa-vs-Kabindi Ngala Mwangandi](#) (2005) eKLR, among other authoritative pronouncements.
 9. In that regard, this being the first appeal from the trial court, I subscribe to the decision in the case of [Mwanasokoni-versus-Kenya Bus Services Limited](#) (1982-88) 1 KLR 278 on the duty of the appellant court. Therefore, the issues for determination in this appeal boil down to whether;
 - a. This matter is res judicata as per the reasoning of the trial,
 - b. Depending on the outcome on issue number (a) hereinabove, did the appellant establish his claim against the respondent as regards adverse possession and trust to the requisite standards?
 - c. What are the just orders to make in this appeal?



10. It is noteworthy that the appellant who was the plaintiff before the trial court sued the respondent who was the defendant thereof by way of an originating summons dated 25th November 2019 under Order 37 Rule 8 of the Civil Procedure Rules, 2010 for adverse possession, trust and permanent injunction, among other orders. The claim was premised on grounds 1 to 5 stated on the face of the said summons, the appellant's supporting affidavit of twenty five (25) paragraphs sworn on even date and annexed documents including a copy of proceedings and determination of objection number 822 at Kanyadier Land Adjudication Section (NOA 4), a copy of proceedings and determination in Land Appeal number 75 of 2004 (NOA 5) and a copy of proceedings in Migori ELCC number 559 of 2017 (NOA 7).
11. By his replying affidavit of eleven paragraphs sworn on 14th February 2020, the respondent opposed the originating summons and sought dismissal of the same with costs. He deposed, inter alia, that the appellant exercised his right in the said Objection, Land Appeal and Migori ELCC number 559 of 2017 (Formerly Kisii ELCC NO. 321 of 2014). That therefore, adverse possession and trust doctrines could not apply in the suit.
12. In reaching the impugned judgment, the learned trial magistrate reasoned in part that;

“.....it is evidence that the plaintiff's occupation of the land has not been peaceful as the same has been challenged in the courts of law. (Emphasis added)
13. The trial court further remarked;

“The plaintiff is only trying to get the land.....having failed to get it through the previous court cases...”
14. In the foregone, the dispute between the appellant and the respondent over the suit land has been previously adjudicated upon to finality. Therefore, the principle of res judicata as captured under section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya, come into play herein.
15. Sections 107, 108 and 109 of the Evidence Act chapter 80 Laws of Kenya provide for burden of proof, incidence of proof and proof of particular fact respectively. As this matter is *res judicata*, the learned trial magistrate arrived at a correct judgment. So, I find no reason to disturb the same.
16. Indeed, it is a cardinal principle that litigation has to come to an end; see *Halsbury's Laws of England*, 4th Edition Volume 22 at page 273.
17. A fortiori, the present appeal lodged by way of the memorandum of appeal dated 20th May 2021, is devoid of merit. The same be and is hereby dismissed.
18. In the spirit of the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya, costs of the appeal and the original suit in the court below, shall be borne by the appellant.

It is so ordered.

DELIVERED VIA EMAIL THIS 27TH DAY OF SEPTEMBER 2022

G.M.A ONG'ONDO

JUDGE

