



**Ouko v Odundo & 2 others (Environment & Land Case 61 of 2021)  
[2022] KEELC 12704 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12704 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 61 OF 2021  
GMA ONGONDO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**MARTIN GUYA OUKO ..... PLAINTIFF**

**AND**

**AGUNGA ODUNDO ..... 1<sup>ST</sup> DEFENDANT**

**RICHARD OTIENO NDIGA ..... 2<sup>ND</sup> DEFENDANT**

**ABAYO MIRIAM OCHIENG ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. In the instant dispute, the central property is land reference number West Kasipul/Kodera Karabach/390 measuring approximately Three Decimal Eight hectares (3.8 Ha) in area (The suit land herein). The same is contained in Registry Map Sheet number 31 and located within Homa Bay County.
2. The suit land is registered in the name of the 3<sup>rd</sup> defendant, Abayo Miriam Ochieng under the [Land Registration Act](#), 2016 (2012) with effect from 23<sup>rd</sup> November 2012 and title deed issued accordingly.
3. The Plaintiff, Martin Guya Ouko is represented by learned counsel, Mr C A Okenye while the 3<sup>rd</sup> defendant is represented by learned counsel, Mr S.N Otinga.
4. Originally, this suit was lodged at Migori Environment and Land Court before it was transferred to this court with effect from 25<sup>th</sup> October 2021 for hearing and determination.
5. It must be noted that the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants (both deceased), was withdrawn by the plaintiff's counsel on June 3, 2021. Therefore, the suit proceeded against the 3<sup>rd</sup> defendant only.



6. Initially, the hearing of the suit proceeded ex parte thus, judgment was rendered for the plaintiff against the three defendants on May 29, 2015. A decree dated 21<sup>st</sup> May 2015 was issued accordingly. However, further to the 3<sup>rd</sup> defendant's application by way of notice of motion dated May 17, 2017, the judgment was set aside and the court granted leave to the defendants to file and serve replying affidavit (s) in this suit.

## **B. The Gist of The Plaintiff's Case**

7. By an originating summons dated 1<sup>st</sup> July 2013 and lodged in court on even date under, inter alia, section 38 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya and Order 37 of the Civil Procedure Rules, 2010, the plaintiff claims to have acquired title to the suit land by way of adverse possession for determination of the issues as hereunder;
  - a) A declaration that the rights to recover land measuring 3.8 Ha comprised in the suit land from the Respondents is berried under the limitation of actions act (cap.22 law of Kenya) and their title thereto extinguished on the grounds that the applicant herein has openly, peacefully, continuously and actively been in occupation and possession of the said 3.8 Ha land comprised in the said land for a period of 43 years from 1970.
  - b) That the Honourable court do order that the applicant be registered as the proprietor of the suit land.
  - c) That there be an order restraining the respondents by themselves, their agents, servants, workers and or employees from interfering in any manner with the applicants quite enjoyment and occupation of the said parcel of land measuring 3.8 hectares.
  - d) That any other order be made as the court deem fit and expedient.
  - e) Costs of this summons be borne by the respondents.
8. The originating summons is founded upon grounds 1 to 13 stated on it's face as well as the 3<sup>rd</sup> plaintiff's supporting affidavit of 13 paragraphs and the annexed copies of documents marked as "MGO 1 to MGO 5" which include; Letters of Administration Ad Litem (PExhibit 1), a green card (PExhibit 5) and a certificate of official search as regards the suit land (PExhibit 4). The plaintiff laments that his uncle, Joseph Ndiga Abok (Deceased) died without having married and had no children. That the deceased gave him the suit land as a gift in the year 1970 and he immediately took possession and occupation of the same. That he then obtained PExhibit 1 in respect of the estate of the deceased who was the proprietor of the suit land
9. It is the assertion of the plaintiff that in 1979, the suit land got registered in the name of the 1<sup>st</sup> defendant who in 2010 transferred the same to the 2<sup>nd</sup> defendant who then transferred it to the 3<sup>rd</sup> defendant in the year 2012. That the plaintiff together with his two wives and children have been in continuous and peaceful possession and occupation of the suit land for over 12 years hence precipitating this suit.
10. On May 10, 2022, the plaintiff (PW1) testified in part that he has lived on the suit land since 1970 peacefully and continuously. That the 3<sup>rd</sup> defendant has unlawfully entered the suit land. He relied on his supporting affidavit and statement dated July 1, 2013 and March 16, 2021 respectively alongside a list of documents dated March 16, 2021 and filed on March 17, 2021 (PExhibits 1 to 11).
11. PW2 was Silfanus Juma Odiény who premised his testimony upon his statement dated March 16, 2021. He stated in part that he was aware of the suit land owned by PW1 who has lived thereon since 1970.



### C. The Defendant's Case In Brief

12. The 3<sup>rd</sup> defendant (DW1) opposed the originating summons by way her replying affidavit sworn on May 17, 2017. She termed the originating summons unmerited, frivolous, baseless, misconceived and incompetent thus, urged the court to strike it out with costs. She relied on her documents marked as "AMO-1A" to "AMO-9A" (PExhibits 1 to 9A) which include; a copy of sale of land agreement, a copy of transfer of land and a copy of consent.
13. According to DW1 who also relied on her replying affidavit as part of her evidence, she cultivates the suit land which she owns as per DExhibit 1A. That PExhibit 10 is non-existent.
14. By the 3<sup>rd</sup> defendant's submissions dated 20<sup>th</sup> June 2022 reference was made to the parties' respective pleadings, brief facts of the case and triple issues for determination including whether the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants abated and whether the plaintiff is entitled to issues sought in the originating summons. Learned counsel for the 3<sup>rd</sup> defendant relied upon Order 24 Rule 4 of the Civil Procedure Rules, 2010 and the case of *Lawrence Muriithi M'bhika and 3 others v Munyi Murwathika and another* [2021] eKLR and submitted that since the court was furnished with two certificates of death, the suit as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants abated on March 12, 2019 and March 17, 2015 respectively.
15. It was also the 3<sup>rd</sup> defendant's submissions in part that it is not in dispute that the 1<sup>st</sup> defendant was registered as proprietor of the suit land on 10<sup>th</sup> May 1979 and sold the same to the 2<sup>nd</sup> defendant who got registered as it's proprietor on 9<sup>th</sup> September 2010. That the latter sold the same to her and she became it's registered proprietor on 23<sup>rd</sup> November 2012 as discerned in the green card marked as "AMO-2A" (DExhibit-2A).
16. The 3<sup>rd</sup> defendant's counsel cited section 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, the Court of Appeal decisions in *Chevron (K) Ltd-vs-Harrison Charo Wa Shutu* [2016] eKLR and *Francis Gitonga Macharia* [1998] eKLR, to reinforce the submissions. Counsel termed the plaintiff's claim untenable and that the same be dismissed with costs.

### D. Issues for Determination

17. Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010 provides for framing of issues and materials from which issues may framed in a suit respectively. Furthermore, it is settled law that the issues for determination in a suit generally flow from either parties' respective pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Company Ltd v Falcon Grounds Ltd* [2000] 2 EA 385.
18. In view of the parties' respective pleadings, evidence and submissions including the authorities cited therein, the issues for determination in this suit are as per the decision in *Wilson Kazungu Katana and 101 others v Salim Abdallah Bakshwein and another* [2015] eKLR where it was held that the doctrine of adverse possession dictates that;
  - a. The land in question must be registered in the name other than the applicant,
  - b. The applicant must be in open and exclusive possession of the suit land in an adverse manner to the title of the owner, and
  - c. The applicant's occupation must be for a period in excess of 12 years having dispossessed the owner or discontinued the possession of the owner thereby



## E. Discussion and Disposition

19. It is important to note that the plaintiff's claim is for the whole of the suit land; see *Muthuita v Wanoe and 2 others* [2008] 1 KLR (G & F) 1024.
20. In respect of the first ingredient, in the case of *Wainaina-v-Murai and 2 others* (1976-80) 1 KLR 283 at 289/290, Simpson J (as he then was) observed;

“.....The land in question is registered under the Registered Land Act.....”
21. Indeed, the suit land is registered in the name of the 3<sup>rd</sup> defendant as stated in paragraph 2 hereinabove.
22. Concerning the second issue, PW1 stated during examination in part that;

“.....I am living on the suit land peacefully and I have done so continuously since 1970.....”
23. Further, according to PW2, the suit land is owned by PW1 who has lived thereon since 1970. During cross examination, PW2 stated-

“.....PW1 has lived on the suit land since 1970.....”
24. It is established law that possession may take different forms including fencing and cultivation; see *Titus Ong'ang'a Nyachieo v Martin Okioma Okioma and 3 others* [2017] eKLR.
25. In the case of *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253, Madan J (as he then was) held;

“The defendant's possession was open and notorious.....There has been no discontinuation of possession by the plaintiff since 1959.....”
26. It was the submission of DW1 that PW1 lodged this suit against the three defendants. That at the time of commencement of the suit, he (DW1) was only seven months old as the registered proprietor of the suit land.
27. It must be remembered that mere change of ownership of the land in question does not interrupt adverse possession doctrine as held in the case of *Githu v Ndeete* [1984] KLR 776; see also Titus Nyachieo case (supra).
28. Besides, filing of a suit to recover land by a registered proprietor would stop time from running for purposes of section 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya; see *Ndatbo v Itumo and 2 others* [2002] 2 KLR 637. Clearly, it is not the 3<sup>rd</sup> defendant who lodged this suit for time to stop running in the instant circumstances where PW1 has demonstrated that he is in open and exclusive possession of the suit land for the prescribed period of time.
29. Regarding the 3<sup>rd</sup> ingredient, it is noteworthy that there can be no dispossession of the suit land if enjoyment and use are possible; see generally *Halsbury's Laws of England*, 3<sup>rd</sup> Edition Volume 24 paragraphs 481 and 482 at pages 251 and 252
30. In Kinguru case supra, the court further noted;

“There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation.....”



31. In adverse possession claim, the applicant must prove exclusive possession over the suit land for a period in excess of 12 years as recognized in the case of *Salim v Boyd* [1971] EA 550; see also Chevron case (supra).
32. Moreover, he who asserts must prove; see Katana case (supra) and sections 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya.
33. As stated in paragraph 5 hereinabove, the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants abated. The suit land was registered in the name of 1<sup>st</sup> defendant (Decease), a person other than the applicant at the time of filing this suit. Currently, it is registered in the name of the 3<sup>rd</sup> defendant who is not the plaintiff. It is manifest that the plaintiff has been in exclusive possession of the suit land for a period in excess of twelve years and the 3<sup>rd</sup> defendant has been dispossessed thereby.
34. The 3<sup>rd</sup> defendant's reply to the plaintiff's claim amounts to a figment of imagination. It fails.
35. In the final analysis, it is the finding of this court that the plaintiff has established his case against the 3<sup>rd</sup> defendant on a balance of probability. In that regard, he is entitled to the orders sought in the originating summons.
36. Accordingly, judgment is hereby entered for the plaintiff against the 3<sup>rd</sup> defendant as sought in the originating summons and as stated in paragraph 7 (a), (b) c and e hereinabove. For clarity, a permanent injunction is granted in favour of the plaintiff against the 3<sup>rd</sup> defendant as per prayer 3 in the originating summons.
37. It is so ordered.

**DELIVERED VIA EMAIL THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**G.M. A. ONGONDO**

**JUDGE**

