



**Kogada v John (Environmental and Land Originating Summons
51 of 2021) [2022] KEELC 12748 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 51 OF 2021
GMA ONGONDO, J
SEPTEMBER 27, 2022**

BETWEEN

PETER WILLISENGSIAS NYAUKE KOGADA PLAINTIFF

AND

PASCAL OKELLO JOHN DEFENDANT

(FORMERLY MIGORI ELC O.S NO. 57 OF 2018)

JUDGMENT

A. Introduction

1. At the heart of the instant suit is a portion of land measuring approximately two (2) acres comprised in land reference number Kanyamwa/Kabonyo/Kwandiku/2186 measuring approximately One Six Decimal Six hectares (16.6 Ha) in area which is equivalent to nineteen (19) acres (Hereinafter referred to as the suit land). It is located within Homa Bay county.
2. The plaintiff is represented by learned counsel, Mr Odondi Awino.
3. The defendant is represented by learned counsel, Mr G S Okoth.
4. On October 25, 2018, this court directed, inter alia, that suit be heard by way of *viva voce* evidence in line with order 37 rule 19 (1) of the [Civil Procedure Rules, 2010](#).
5. By consent of February 14, 2019 between the plaintiff and the defendant, this dispute was referred to the Chief, East Kanyamwa Location in Homa Bay county with a view to resolving the same as envisioned in articles 60 (1) (g) and 159 (2) (c) of the [Constitution of Kenya, 2010](#). However, the plaintiff failed to attend the said chief's meetings as required as shown in the latter's letter dated March 25, 2019. So, the matter was not resolved and it was referred back to this court for further hearing and determination.



6. Initially, this suit was lodged at Migori Environment and Land Court. On October 28, 2022, the same was transferred to this court for hearing and determination in the spirit of articles 6 (3) and 48 of the [Constitution of Kenya, 2010](#).

B. The Gist Of The Plaintiff's Case

7. The plaintiff generated this suit by way of an originating summons dated April 26, 2018 and filed herein on even date pursuant to, inter alia, order 37 (supra) seeking the orders infra;
- a. A declaration that the defendants' right to recover a portion of 2 acres of the suit land is barred under the [Limitation of Actions act](#) and the defendants' title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid land for a period exceeding 17 years.
 - b. There be an order of sub division of the suit land and a portion of 2 acres be registered in the name of the plaintiff.
 - c. There be an order restraining the defendant by himself, servants, agents or otherwise howsoever from interfering with the plaintiff's peaceful possession and occupation of a portion of 2 acres of the suit land in any manner howsoever and whatsoever.
 - d. The deputy registrar/or the executive officer of this honourable court be directed and or ordered to execute the transfer documents and all attendant documents to facilitate the subdivision and transfer of 2 acres from the suit land in favour of the plaintiff.
 - e. Costs of this originating summons be borne by the defendants.
 - f. Such further and or other orders be made as the court may deem fit and expedient in the circumstances of this case.
8. The originating summons is premised on grounds 1 and 2 stated on it's face, the plaintiff's supporting affidavit of fourteen paragraphs as well as a copy of the green card marked as "PWNK 1" (PExhibit 1) and annexed to the affidavit. The plaintiff claims to have acquired two acres of the suit land by way of adverse possession as provided for under section 28 (h) of the [Land Registration Act, 2016 \(2012\)](#). That in the year 2001, he bought the portion of the suit land from John Omollo Oswago (Deceased) who died in the year 2014 before transferring the portion of land to him. That he cultivates the portion of the suit land and has since developed the same by constructing a dwelling house thereon.
9. In his supplementary affidavit sworn on May 24, 2018 and filed herein on May 25, 2018, the plaintiff deposed, inter alia;
- a. "That indeed the father of the defendant sold to me only 1 acre of being a portion of Kanyamwa/kabonyo/kwandiku/2186.
 - b. That Thomas Mboya Osewe also sold to me 1 acre being part of his share as a family in the suit land.
 - c. That I now claim a total of 2 acres out of the suit land."
10. The plaintiff (PW1) testified, inter alia, that he is a pastor with the Seventh Day Adventist Church, Nyadenda in Homa Bay county. That he bought two acres of the suit land from the Deceased who was the defendant's father. That he entered into the suit land in the year 2001 and he is in peaceful and continuous occupation of the same to-date. He relied on his statement filed on October 19, 2018 and



a list of his documents dated April 26, 2018 S/Nos. 1 and 2 (PExhibits 1 and 2) as well as a list of his documents dated May 24, 2018 (PExhibit 3) as part of his testimony.

11. By the submissions dated June 20, 2022, learned counsel for the plaintiff made reference to the orders sought in the originating summons and the evidence of PW1 that he has openly, peacefully and uninterruptedly occupied two acres of the suit land for more than 12 years. That the defendant is disputing the acreage sold to the plaintiff and not the area of the suit land occupied by the latter. That the plaintiff has asserted that he is in occupation of two acres thereof.
12. So, counsel urged the court to grant the prayers sought in the originating summons. To buttress the submissions, counsel relied upon this court's decision in the case of *Rosebella Anyumba v Clement Sakiri* (2021) KLR and Kisumu ELCC No 43 of 2018 and another decision, *Peter Okoth v Ambrose Ochido Andajo and another* (2021) KLR.

C. The Gist Of The Defendant's Case

13. The defendant opposed the plaintiff's claim by way of his replying affidavit of twelve paragraphs sworn on May 21, 2018 and filed on even date. He deposed, inter alia, that whereas his deceased father sold a portion of the suit land to PW1, it was 0.3 hectares (0.75 of an acre) which he is willing to transfer to PW1. That his deceased father did not sell two acres to the plaintiff as alleged by the latter.
14. The defendant stated that PW1 failed to attend the chief's meetings as pointed out in paragraph 5 hereinabove. He annexed letters ("POJ 1 to POJ4") to his affidavit in support of his assertion.
15. The defendant (DW1) relied on his statement dated February 6, 2019 and a list of documents of even date (DEXhibits 1 to 5) as part of his testimony. He told the court in part that PW1 went to their village as a pastor and a friend of his deceased father who gave him an unmeasured land of the suit land. That PW1 occupies two acres of the suit land.
16. The defendant's submissions dated April 25, 2022 refer to the parties respective pleadings, facts and evidence as well as identified three issues for determination including whether PW1 purchased two acres and whether he is entitled to the same by adverse possession. His counsel submitted that PW1 failed to serve the pleadings upon the defendant thus, did not to comply with order 5 of the *Civil Procedure Rules, 2010*.
17. Counsel analysed the triple issues in the negative and urged the court to dismiss the suit with costs. It was submitted that PW1 failed to produce in evidence, any written contract between him and John Omolo Oswago and Thomas Mboya Osewe in support of his claim. Counsel relied on section 38 of the *Limitation of Actions Act* chapter 22 Laws of Kenya and the case of *John Ndungu Kipsoi v Samuel Chepkulul and another* (2018) KLR, to fortify the submissions.

D. Issues For Determination

18. It is well settled that the issues for determination in a suit generally flow from either the parties' respective pleadings or as framed by the parties for the court's determination; see *Great Lakes Transport Co Ltd v Kenya Revenue Authority* (2009) KLR 720.
19. Having taken into account order 15 of the *Civil Procedure Rules, 2010*, the parties' respective pleadings, evidence and submissions inclusive of the authorities cited therein, the issues for determination herein area as captured in case of *Wilson Kazungu Katana and 101 others v Salim Abdallah Bakshwein and another* (2015) KLR where the Court of Appeal noted that adverse possession dictates thus;
 - 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

- 20. It is noteworthy that property in the present dispute is a portion of land measuring approximately two acres of the suit land as stated in paragraph 1 hereinabove; see *Mutbuita v Wanoe and 2 others* (2008) 1 KLR (G & F) 1024.
- 21. On the issue of registration, PW1 testified that the suit land is registered in the name of the defendant. This is shown in PExhibit 1 herein.
- 22. Moreover, the fact of registration of the suit land in the name of DW1, was affirmed by DW1. Therefore, it is common baseline thereof as revealed in DExhibits 1, 3 and 4 herein.
- 23. Concerning the second and third dictates which are interrelated in the obtaining context, PW1 claims possession of the suit land by reference to PExhibits 1 to 3. On the other hand, DW1 claims possession of the same and relied on DExhibits 1 to 5.
- 24. In examination in chief, PW1 stated that he entered into two acres of the suit land in the year 2001 upon its purchase. That he occupies the same to-date.
- 25. In examination in chief, DW1 stated that his father gave PW1 less than two acres as stated in paragraph 13 hereinabove. Nevertheless, DW1 did not dispute the occupation of part of the suit land by PW1.
- 26. In particular, DW1 stated in examination in chief that PW1 occupies two acres of the suit land and not one acre. He maintained so during cross examination.
- 27. As stated in paragraph 9 (a) above, PW1 bought one acre from the deceased father of DW1. Plainly, PExhibits 1 and 2 do not amount to written agreements as commanded by section 3 (1) of the [Law of Contract Act](#) Chapter 23 Laws of Kenya.
- 28. Further, PW1 contended that he bought one acre from one Thomas Mboya Osewe as disclosed in paragraph 9 (b) hereinabove. Also, he did not present any written agreement or at all thereof.
- 29. Additionally, DW1 testified that Tom Mboya Osewe is a beneficiary of the estate of the defendant's deceased father. On his part, PW1 affirmed that the distribution of the estate of the said deceased has not been carried out.
- 30. It is trite law that the estate of the deceased person is vested in the legal representative; see *Otieno v Ougo* and another (1986-89) EALR 466 and *Rajesh Chudasama v Sailesh Chudasama* (2014) eKLR, among other authoritative pronouncements.
- 31. The defendant has indicated that he ready and willing to transfer 0.3 hectares (0.75 acres) of the suit land to PW1 herein.
- 32. In the foregone, is the legal representative of the estate of his deceased father. The answer is in the negative in the absence of the requisite documents as noted in Otieno and Chudasama cases (supra).
- 33. To that end, it is the finding of this court that the instant suit is misconceived and incompetent in the obtaining circumstances.



34. Wherefore, the plaintiff's suit commenced by way of an originating summons dated April 26, 2018 and filed herein on even date, be and is hereby struck out.
35. Given the nature of the matter and the circumstances of the same, each party to bear his own costs of this suit; see *Samwel Kamau Macharia and another v Kenya Commercial Bank Limited and others* (2012) eKLR.
36. It is so ordered.

DELIVERED VIA EMAIL THIS 27TH DAY OF SEPTEMBER, 2022

G. M. A. ONGONDO

JUDGE

