



**Makokha & another v Okello & another (Environmental and Land Originating
Summons 111 of 2016) [2022] KEELC 12780 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 111 OF 2016
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

JOSEPH AKHUNGU MAKOKHA 1ST PLAINTIFF

EPERIM KIZITO MAKOKHA 2ND PLAINTIFF

AND

BENARD OUMA OKELLO 1ST DEFENDANT

VITALIS BARASA NYAMBOKI 2ND DEFENDANT

JUDGMENT

1. The two plaintiffs took out the originating summons dated 8/9/2016 in which they raised the following questions for determination;
 - a. That the Applicants Joseph Akhungu Makokha and Eperim Kizito Makokha be declared the absolute owners of parcel Nos. Bukhayo/Buyofu/1415 and L.R No. Bukhayo/buyofu/1416.
 - b. That the Respondents Moses Morris Pamba and Vitalis Barasa Nyamboki be ordered to execute all documents of transfer in respect of the parcel of land Nos. Bukhayo/Buyofu/1415 and L.R No. Bukhayo/Buyofu/1416 in favour of the Applicants failure to which the Deputy Registrar of this Honourable Court be empowered to execute the same on behalf of the Respondents.
 - c. That the Respondents, their agents, servants and or workers be restrained permanently by an order of injunction from selling, transferring, fencing off, further sub-dividing and or in any manner whatsoever interfering with the said parcels of land that they may have transferred into their names.
 - d. That the Respondents be ordered to give vacant possession of any part of the suit land herein that they may be occupying.



- e. That Respondents do meet the costs of this suit.
2. The originating summons is premised on the grounds listed on its face and the supporting affidavit sworn by the 1st Applicant. Inter-alia, the Applicants state that they have been living on L.R No. Bukhayo/Buyofu/160 with their families for over 30 years which land has since been sub-divided into Nos. 1415 and 1416. The Applicants deposed that the sub-divisions were illegal as it was done without their consent and urged the court to register them as owners thereof by virtue of their occupation which has been peaceful, quiet and uninterrupted for over 30 years. They also sought an order of permanent injunction to issue against the Respondents.
 3. The Respondents opposed the claim through the replying affidavit sworn by the 1st Respondent on 21st September 2016. He deposed that parcel No. 160 belonged to constant Mumia Anyiko. That after sub-division, L.R No. 1415 measuring 0.60ha was registered in 1st Respondent's name and No. 1416 in the name of the 2nd Respondent as shown in the annexed certificates of searches. The Respondents aver they have been in peaceful occupation until the Applicants instated this suit. According to the deponent, the Applicants live on parcel No. Bukhayo/Buyofu/161. The Respondents stated that they purchased the suit land from Constant. They urged the court to dismiss this suit which they state is undermining their quiet possession of the suit land.
 4. The hearing of the suit commenced on 9th March 2021 with the evidence of the 1st Applicant as PW1. PW1 stated that the defendants are from a different family but they all belong to the same clan. The witness said they started living on the land in 1960 while the defendants got on to the land without their consent and sub-divided it. He urged the court to order the registration of the suit land into their names.
 5. In cross-examination PW1 said the County Surveyor visited the suit land but he was not aware of the report filed. He admitted facing a charge over malicious damage to property. That constant Mumia is not his grandfather and he does not have any document that shows the land was registered in the name of his grandfather. PW1 agreed 1st defendant is their neighbour living on a land next to the suit land. He denied sugarcane was grown on the suit land and that title to the parcel 160 was closed on sub-division on 7th January 1999.
 6. The 2nd plaintiff was stood down to enable him record his statement. He never returned to the dock to testify. Instead Mr. Makokha Obari Muyumbu was called to testify as PW3. He stated that he had known Odima Oprong for the last 45 years. According to him, parcel 160 belonged to Odima Oprong for the last 45 years. According to him, parcel 160 belonged to Odima Oprong who was also his neighbour. That the plaintiffs are grandsons of Odima and they live on this land.
 7. On cross-examination, PW3 answered that his land is parcel No. 159 but he does not know the owner of parcel No. 161. That Vitalis Barasa (2nd defendant) who is son of Onyiko stays on Onyiko's land todate. PW3 further denied that Vitalis had grown sugarcane on the suit land. The witness stated he knew nothing about a house on the land which was demolished.
 8. William Onyango Odima testifying PW4 said he is a grandson to Odima Oprong. That he lives on the suit land with his brothers (plaintiffs) and he built his house on that land in the year 2011. It is his evidence that their land neighbours parcel No. 159. He wondered why the defendants are disturbing them. PW4 admitted in cross-examination that parcel 161 belonged to Odima Oprong but he is not living on it. His father got a share in parcel No. 161 where he lived. He also said that Vitalis son of Onyiko lives on parcel No. 159. That Morris Pamba (1st defendant) is also a grandson to Onyiko.



9. The plaintiff's 5th and second last witness was Stephen Makokha Odima from Madende village. He stated that he is a brother to the plaintiffs and was born in 1982. PW5 averred that when he went to school in the 1990s, the plaintiffs were already cultivating the portion of suit land neighbouring parcel No. 159 and there was no visible boundary between the two parcels. That while he was in standard four (4), Constant Mumia Onyiko came with some people to plant the boundary but which the plaintiffs resisted, quarrelled and even removed the sisal that had been planted.
10. PW5 added that he planted sugarcane on a portion of the suit land in the year 2006 with the consent of the plaintiffs and proceeded to produce a contract agreement with Mumias Sugar to corroborate his evidence. That by the end of 2011, their family decided that William Onyango Odima to build his home on the suit portion and also cultivates it which he does today. He denied that Constant Mumia or any of his relatives have ever cultivated this land.
11. In cross-examination, PW5 stated that the plaintiffs had remained on the suit parcel while he stayed on parcel No. 161 which is also where their father's home was. That he never saw any sugarcane planted by Maurice Pamba. He was present when the land Registrar visited in the year 2016. He was aware the plaintiffs were arrested and charged with the offence of malicious damage to property which case is still pending.
12. PW6, Francis Oteba gave evidence stating that he was given permission to plant cassava on the suit land in 2011. That when he went to harvest his cassava, he found when Maurice Pamba had brought a tractor to plough the land. However, the ploughing did not take place because of resistance from the plaintiffs.
13. Benard Ouma Okello gave his evidence on 23rd February 2022 as the administrator of Maurice Pamba's estate (the 1st defendant) who died before the case was concluded. DW1 said L.R 1415 belongs to the 1st defendant while L.R 1416 belonged to the 2nd defendant. According to DW1, they have used the suit parcels for over 30 years and denied that the plaintiffs have ever used it. That his father used to cultivate the suit land. He produced the following documents in support of his evidence; charge sheets as Dex 1, sugarcane contract Dex 2. Debit from Mumias Sugar Company Ltd – Dex 3 and a statement from the same company as Dex 4.
14. The 2nd defendant gave evidence as DW2 and testified that he was the complainant in the criminal case against the plaintiffs. That he was born in 1975 and was brought up on the suit parcel. He continued that his father died in 1985 and was buried on the suit land. According to DW2, he continued living on the land until 2016 when the plaintiffs came and destroyed their crops and house.
15. In cross-examination, DW2 stated they lived on parcel No. 160 before it was sub-divided. That the original owner of the suit land was Constant Mumia who was the son of Onyiko and he (DW2) is the grandson of Constant Mumia. That he has not taken out letters of administration of the estate of Odimo Opron and that he was given the land by his grandfather.
16. Longinus Ekesa Pamba testified as DW3 and stated that the plaintiffs are his neighbours and cousins. That before 2016 Morris Pamba was cultivating L.R No. 1415 and the 2nd defendant was staying and cultivating L.R 1416. That Maurice got the land in 1991. He did not know why the children of Maurice never came to live with him on this land. This marked the close of the defence case.
17. The plaintiffs filed their submissions on 15th March 2022 and submitted that they were not in possession of documents regarding this case which they later obtained from the court registry after the defence closed their case. They noted from the recovered documents the expression by the surveyor which said the "boundaries were established in 1992 under the supervision of the proprietor".



18. They also urged the court to look at the pleadings filed particularly the interlocutory pleadings in which there was no mention that Constant Mumia lived on the suit land or was buried on it. They also analysed Dex 4 dated 24/5/2006 which they submit contradicts the agreement dated 29/6/2011 (Dex 3). Further that the defence failed to state when Constant Mumia moved out of the suit land save for DW3 who stated Constant moved out in 1996. That the surveyor and Constant Mumia drew boundaries from the office as they had been prevented from doing so on the ground in 1992.
19. The defence filed their submissions on 30/3/2022 and raised the following two issues;
- i. Whether the Applicants are entitled to parcels of lands known as Bukhayo/Buyofu/1415 and L.R No. Bukhayo/Buyofu/1416 by way of adverse possession.
 - ii. Whether the Applicants are entitled to the reliefs sought?
20. They referred to a quotation in the case of Gabriel Mbui vs Mukindia Maranya (1993) eKLR where the court said thus;

“Elements that need to be proved by a party invoking the doctrine of adverse possession are as follows;

- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use i.e without permission from the true owner of the land occupant.
- d. The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi. That is to say occupation with the clear intension of excluding the owner as well as other people.
- e. The possession by the person seeking to prove title by adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land.
- f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
- g. The rightful I owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to.”

And the case of Wilson Kazungu Katana & 101 others V Salim Abdalla Bakshwein & Another (2015) eKLR where the Court of Appeal held; “that the parcel of land must be registered in the name of a person other than the Applicant; the Applicant must be in open and exclusive possession of that possession of that piece of land in an adverse manner to the title of the owner; and the Applicant must have been in that occupation for a period in excess of 12 years having dispossessed the owner or there having been discontinuance of possession by the owner. It also placed the burden of proving adverse possession upon the claimant.”

21. The defendants submit the plaintiffs have not proved their case for the reasons inter alia that the defendants were in actual occupation of the suit land as demonstrated by the exhibits produced (photos



Dex 5 and debit note). That the plaintiffs live on the neighbouring land which is parcel No. 161. They referred to the Land Registrar's report (Dex 8) which gave names of aggressors as William, Fredrick, William Odima and Stephen Namenya thus confirming the current plaintiffs are not in occupation.

On whether the reliefs sought should be granted, the defendants answered in the negative stating that the case has not been proved to the required standards. They urged the court to dismiss the suit with costs.

Determination:

22. The main question this court is called to answer is who was and is in occupation of the land previously known as Bukhayo/Buyofu/160 and now sub-divided into Bukhayo/Buyofu/1415 and 1416. It is not in dispute that parcel No. 160 was registered in the name of Constant Mumia as at 25th November 1971 as shown in the green card produced by both parties. The mutation form produced by both parties also exhibit a sub-division undertaken by the said Constant Mumia in 1992. It is on this mutation where the surveyor made the remarks referred to by the plaintiffs that the boundary was established under the supervision of the proprietor. The boundary referred to in the mutation in my understanding refers to the boundary between the two new numbers created i.e. parcel 1415 and parcel 1416.
23. The plaintiffs who are the sons of Oduma Oprong admitted that their father's home was on parcel No. 161. Therefore, they are required under the law to demonstrate when they started using parcel No. 160 and what was the nature of that use. They have to satisfy the court that the nature of use displayed to the world that they were indeed possessing the entire land parcel 160 (since they are claiming the whole of it). Thereafter they must show that the ownership was peaceful and uninterrupted for a period of 12 years or more.
24. According to the plaintiffs' claim, they have used the suit land for over 30 years as expressed in their affidavits in support of their originating summons. The Respondents have contested this claim by asserting that the plaintiffs lived on the adjacent parcel No. 161. The Applicants in their submissions referred the court to look through the affidavits filed in support of and against the interlocutory application dated 21/9/2016. The parties were each claiming to be in possession of the suit parcel. In the affidavit of the 1st Applicant, he deposed that parcel No. 160 belonged to Odima Oprong, is family land and they have occupied it since the 1960s. Now this aversion is contradictory of the Applicant's claim in so far as they alleged the land belonged to their grandfather Odima Oprong making it family land. The averment that their occupation is by virtue of ancestry hence the claim ceases to be adverse. The timeline of from the 1960s is immaterial as time started running from the date of registration of land in 1972 in the name of Constant Mumia.
25. In his evidence affidavit dated 1st October 2016, the 1st Applicant generally stated that they have been in occupation of the suit land together with their families. The statement does not elaborate what constituted the family in occupation. In his evidence in chief before the court, he does not say much other than stating the defendants have not built on the suit land. It is in cross-examination that he said he had been planting maize on the land. He also said that during the survey visit, his house was found to be on parcel No. 160. PW1 admitted that the 1st defendant was a neighbour although he did not know his parcel number.
26. The 2nd Applicant did not file a witness statement. He was stepped down to make time for writing and filing a witness statement but in that process they sacked their advocate on record. It seems they forgot why he had been stepped down and therefore they proceeded to call more witnesses without first giving his own account of when he got on the land and how he is utilizing that constitutes his possession. His case thus hangs on the evidence of the 1st Applicant and of their witnesses.



27. PW3 who is 91 years old stated parcel No. 160 belonged to Odima who was married to his aunt. In cross-examination, PW3 said he knew nothing about parcel No. 161. PW3 admitted knowing the 2nd Respondent as a grandson of Onyiko and that the 2nd Respondent stays on Onyiko's land where they are still living on today. PW3 further admitted knowing Maurice Pamba from his time of birth but knew nothing about parcel No. 1416. From the analysis of PW3's evidence, the witness seemed to have confused the plaintiff's family land which is parcel 161 from the one they claiming i.e. parcel No. 160. PW3 also confirms that the 2nd Respondent was indeed in possession of their family land now claimed by the Applicants. PW3 did not however tell us where the 1st Respondent was living despite knowing him from birth.
28. PW4 stated he built on the suit land in the year 2011. According to this witness, both parcel No. 160 and 161 belonged to one person and Vitalis (2nd Respondent) who is the grandson of Onyiko lived on a neighbouring parcel No. 159. PW4 confirmed that the 1st Respondent is also a grandson of Onyiko. PW4 further admitted in cross-examination that he was present in 1992 when Constant Mumia brought the surveyors thus contradicting the submission that the boundaries for the subdivision may have been drawn from a cadastral map in a survey office as no physical boundaries were marked.
29. PW5 stated that he ploughed and planted sugarcane on the suit land in the year 2006 with permission of his brothers. According to PW5, Constant Mumia's father owned parcel No. 159 where he lived before buying land in Nambale. PW3 stated he owned parcel No. 159. Taking the evidence of the witnesses into consideration, it seems clear that PW5 is not sure who owns which parcel of land. Therefore his evidence that they have been in occupation of the suit land uninterrupted is mirrored on the assumption that L.R No. 160 and 161 was/is one title.
30. The burden of proof rested upon the Applicants. The three parcels of land numbers Bukhayo/Buyofu/159, 160 and 161 neighbours each other with parcel No. 160 sharing a common boundary on one side with No. 161 and on the other side with 159. For the plaintiffs suit to succeed, they were required to demonstrate that they were living on or using was clearly defined as parcel number 160 to the exclusion of the Respondents. That such use should be so evident that the neighbours and everybody also know that they had dispossessed the Respondents. However from the evidence presented, the 1st Applicant believed parcel No. 160 was family land meaning he did not recognize the title of Constant Mumia or the Respondents. According to the Applicants there was no clear boundary between parcel No. 160 and 161. Further their witnesses admitted the Respondents are living on their grandfather's land. An inference is drawn that if the Respondents are in possession, how can the Applicants affirm they dispossessed them from using parcel No. 160? Thirdly, the Applicants did not elaborate how they had put the land to use that dispossessed the Respondents. They have witnesses coming to tell court that they ploughed the land with consent of the plaintiffs and one who settled on it in 2011. None of these witnesses explained that beside giving permission how were the plaintiffs utilizing the land?
31. The Respondents gave evidence that they have always been in occupation until 2011 when the Applicants started interfering and in 2016 when they damaged the 2nd Respondent's property resulting into their arrest. In my view the evidence of the Respondents is clearly in sync with the evidence of the Applicant's witnesses. They do not deny the Respondents are in occupation of a parcel (evidence of PW3, PW4, and PW5) what they did not get right is the parcel number of the land the Respondents are occupying. The burden did not shift on the Respondents to prove the parcel of land number they are living on.



32. In conclusion, I find that the Applicants' case has not met the threshold for proof of adverse possession. The same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

