



Oikiambe (Suing as Legal Administrator and Personal Representative of the Estate of John Aminga Lukas) v Aondo & another (Environmental and Land Originating Summons E005 of 2022) [2025] KEELC 3163 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2022**

**M SILA, J
APRIL 2, 2025**

BETWEEN

DEMITHA KERUBO OIKIAMBE (SUING AS LEGAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN AMINGA LUKAS) PLAINTIFF

AND

**IRENE OSEBE AONDO 1ST DEFENDANT
RATEMO CHANGE 2ND DEFENDANT**

JUDGMENT

(Suit claiming land through adverse possession; plaintiff contending that her late husband purchased the suit land in 1974 and took possession; defendants refuting this and claiming that it is them in possession; evidence overwhelming that the plaintiff's late husband took possession in 1974 and fenced off the land together with the neighbouring land that he owned; more 44 years lapsed to the time that the suit was filed; judgment entered for the plaintiff)

1. This suit was commenced through an Originating Summons which was filed on 21 July 2022. The applicant (whom I will henceforth refer to as the plaintiff) sues as the administrator of the estate of the late John Aminga Lukas (the deceased) who was her husband. He died on 28 May 2018. It is her case, as pleaded in the Originating Summons and Supporting Affidavit, that in 1974, her late husband purchased land measuring 0.23 ha from the 2nd respondent, Ratemo Change, (whom I will refer to as the 2nd defendant) through a written agreement. The land purchased is said to have been part of the land parcel Nyaribari Chache/B/B/Boburia/2282 registered in name of Change Kaibe (now deceased) the father of the 2nd defendant. It was averred that the 2nd defendant had been allocated this portion of land by his father and that his father



consented to the sale. It is pleaded that the husband of the plaintiff took possession of the land in 1974 and his family, including the plaintiff, have been in open and exclusive possession and utilising it without any interference, until some time in 2022, when the 1st respondent (herein referred to as 1st defendant), threatened to evict the plaintiff and her family from the said land. It was averred that this land parcel No. 2282 was subdivided so that the portion that the late husband of the plaintiff purchased is now registered as the land parcel Nyaribari Chache/B/B/Boburia/13662 (parcel No.13662) and which is currently registered in name of the 1st defendant, Irene Osebe Aondo. Thus, in this suit, the plaintiff seeks an order that this land parcel No. 13662 be registered in the name of the estate of the deceased and the defendants be permanently restrained from interfering with the same on the basis that the deceased had acquired it through adverse possession.

2. The defendants filed a replying affidavit to oppose the Originating Summons which is sworn by the 2nd defendant. He acknowledged being the son of Change Kaibe, who was registered as proprietor of the land parcel Nyaribari Chache/B/B/Boburia/2282 measuring 3.4 Ha. He deposed that Change Kaibe died on 7 January 1971. He denied ever entering into any sale agreement to sell land to the late husband of the plaintiff. He points out that the sale agreement relied on by the plaintiff does not indicate the land parcel number being sold, the acreage being sold, how the purchase price was to be paid, nor when it was to be performed and completed. He adds that neither was there consent of the Land Control Board. He contends that at no time during their lifetime did the plaintiff's husband claim the land from his father and avers that the plaintiff has waited until they have died. He states that they were living happily as neighbours, with the late husband of the plaintiff occupying the adjacent land parcel Nyaribari Chache/B/B/Boburia/2283, registered in the name of the plaintiff's father in law. He states that he was 19 years in 1974 and he could not have sold the land. He has asserted that it is them (defendants) who have been in occupation of the suit land. He has elaborated that in 2016 his father subdivided the original land parcel No. 2282 into three parcels i.e parcels No. 13660-1362. The parcel No. 13660 is in name of Change Kaibe; the parcel No. 13661 is in his name i.e Simeon Ratemo Change; and parcel No. 13662 (the suit land) is in name of the 1st defendant who is his daughter. He asks that the suit be dismissed.
3. Directions were taken to have the Originating Summons heard through viva voce evidence.
4. PW-1 was the plaintiff. She more or less reiterated what is in her pleadings which I have already set out above. She stated that she got married into the home in 1979 and found the land already bought. She produced the sale agreement dated 17 January 1974 which she stated is the one that her late husband had with the 2nd defendant. She stated that she came to court after the fence was interfered with and the 2nd defendant started claiming that she does not own the land.
5. Cross-examined, she acknowledged that at the time of sale, the land was registered in name of Change Kaibe and that the 2nd defendant had no capacity to sell it. She also admitted that the sale agreement does not state the parcel number being sold, the measure of land, or the period that the transfer was to be effected. The agreement appeared to be one adding more land to a previous sale. She affirmed that she also owns the land that is adjacent to the suit land. In re-examination, she testified that there was



a first parcel of land that her father in law purchased from Change Kaibe and this was a further sale by Change Kaibe so that he could have funds to pay dowry for the 2nd defendant.

6. PW-2 was Justus Arasa Change. He is step-brother of the 2nd defendant. He elaborated that the 2nd defendant is from the first house and he is from the second house. He was born in 1979. He offered that the 1st defendant is daughter of the 2nd defendant. His evidence was that as he grew up, he found the family of the plaintiff on the suit land. He testified that the land has bananas, coffee and blue gum trees. He stated that he has never seen his family (the family of Ratemo) use this land and has never witnessed any altercation over it. He testified that the father in law of the plaintiff had earlier purchased land from their family and the suit land was added later. Cross-examined, he acknowledged that he had not been born in 1974 when the sale agreement was prepared.
7. PW-3 was David Lemaiyan, a surveyor working with the Ministry of Lands. His evidence was that he visited the disputed land on 3 May 2023 and he prepared a report which he produced. He affirmed that the land is used by the plaintiff. He elaborated that the suit land is fenced together with the parcel No. 2283 so that on the ground they appear as one parcel. On the suit land he found mature eucalyptus trees, some coffee bushes and maize. Cross-examined he testified that the current registered proprietor is the 1st defendant who got registered as proprietor in the year 2016. He had no record of a previous boundary dispute. He reiterated that on the ground the suit land is fenced together with the parcel No. 2283 and there is no boundary between the two parcels on the ground.
8. With the above evidence, the plaintiff closed her case.
9. DW – 1 was Simeon Ratemo Change the 2nd defendant. He relied on a witness statement which is in the same lines as what he had put in his replying affidavit which I already alluded to earlier in this judgment.
10. Cross-examined, he could not now recall the year of death of his father, though he did state it could have been 10 years back. Pressed he agreed that his father was alive in 2016 and that it was him (his father) who subdivided the land in 2016. He was then very old, aged about 120 years. He testified that the plaintiff's family own the parcel No. 2283 after they bought it from his father. It was in this parcel No. 2283 that the plaintiff's husband was buried. He agreed that there are old mature eucalyptus trees which are more than 20 years old on the suit land but he claimed that they were planted by his father. The sale agreement was put to him and he denied signing it. He acknowledged that the 1st defendant is his daughter. She is married in Masimba area away from the suit land. He claimed that she had some issues in her married home and she came back. He conceded that he had brought no contrary survey report or any tangible evidence to show that it is himself or his daughter using the suit land. He nevertheless claimed that the last time he used the land was 3 years back. He testified in re-examination that the suit land belongs to his daughter.
11. With the above evidence, the defendants closed their case.
12. I invited counsel to file written submissions and I have taken note of the submissions filed by Mr. Ochoki, learned counsel for the plaintiff. I have not seen any submissions



filed by Mr. Godia, learned counsel for the defendants. My disposition will be brief because I think the facts are overwhelmingly in favour of the plaintiff.

13. It is of course the plaintiff's case that the suit land was purchased by her late husband in 1974 from the 2nd defendant. She avers that the family took possession of the suit land and used it together with the neighbouring land parcel No. 2283, which the plaintiff's family own, and which land is registered in name of her father in law i.e father to her late husband. This evidence, that the land was sold to the plaintiff's late husband was supported by a member of the family of the defendants, i.e PW-2, and his evidence must be taken seriously.
14. It should be remembered that this is a case for adverse possession, not a case for specific performance to enforce the sale agreement. The purpose of the sale agreement is therefore only to show how the family of the plaintiff came into possession and the time that they came into possession. I am indeed persuaded that it is through this sale agreement that the plaintiff's late husband took possession of the suit land. There is evidence that the suit land has been in the possession of the plaintiff's family for a very long time partly depicted by mature eucalyptus trees.
15. Despite the defendants alleging that they are the ones who have been in possession and use of the land, that cannot be true. When cross-examined, the 2nd defendant could not give any elaboration of any activity that he does on the ground or that the 1st defendant does. He has no contrary survey report or any photograph to demonstrate any occupation of the suit land. Indeed, save for his word of mouth, there was absolutely nothing to support the defendants' contention that it is them who have been on the suit land.
16. The evidence of PW-3, Mr. Lemaiyan, the Land Surveyor, is very telling. He produced a report which shows that the suit land is used together as one with the land parcel No. 2283 that the plaintiff's family owns. There is no boundary demarcating the two and they are fenced as if this was one parcel of land. That buttresses the evidence of the plaintiff that they have been on the suit land for a long time and they have been using it. I am persuaded that the plaintiff's late husband took possession of the suit land in 1974 through the sale agreement that was produced and that he kept possession until his demise in 2018. From 1974 to 2018 is a period of 44 years.
17. It is trite, and I need not cite any authority, that to prove adverse possession, one needs to demonstrate possession that is covered by the maxim *nec vi, nec clam, nec precario*, that is without violence, without secrecy and without permission, for a period of at least 12 years. The evidence is clear that the late husband of the deceased had been on the land for 44 years which far surpasses the 12 years needed to prove adverse possession. There is no evidence of any violence or altercation on the suit land while he was alive. It cannot be said that he was there with the permission of the registered land owner as he was neither a lessee nor a licensee. He lived on the land on the strong belief that he owned it having purchased it in the sale agreement of 1974. His right to the land was never defeated by the subdivision of the land or transfer of title to the 1st defendant. Such transfer of title or subdivision does not defeat a claim of adverse possession. Neither is the time counted from the date in which the current registered proprietor came to be proprietor; time is counted from the date of first possession of the land that is claimed, irrespective of the title in which it was under, and regardless of the person who was then proprietor.



18. I am persuaded that the 2nd defendant sold the land in 1974. He however now wants to claim it back on the motivation that his daughter has differed with her husband and has now come back home. It is clear to me that when the land was being subdivided in 2016, it was with an attempt to create some land for the 1st defendant to settle, now that she has come back to her father's home. I am afraid to inform the defendants that by the time they were creating this title in the name of the 1st defendant, their rights to the land had already been extinguished by dint of Section 17 of the *Limitation of Actions Act*, Cap 22, which provides as follows :
17. Subject to Section 18, at the expiration of the period prescribed in this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.
19. The time prescribed to bring an action to recover land is 12 years pursuant to Section 7 of the *Limitation of Actions Act*. Thus, if the registered proprietor of the land or the respondents wished to recover the land, they had 12 years from 1974 to do so which ended in 1986 at which point the title of the registered proprietor got extinguished.
20. From the foregoing, it is clear that I find merit in the plaintiff's case. I declare that the plaintiff has proved that the estate of the late John Aminga Lukas, deserves to be registered as proprietor of the land parcel Nyaribari Chache/B/B/Boburia/13622 by dint of the doctrine of adverse possession. I issue an order directed at the 1st defendant to execute all necessary documents and transfer the suit land to the name of John Aminga Lukas (deceased) within the next 30 days. In default the Deputy Registrar or a person assigned by him to execute the requisite documents so as to have the suit land transferred into the name of John Aminga Lukas (deceased). The defendants and/or any person claiming under them are hereby permanently restrained from entering into any dealings over the suit land and/or interfering with the quiet possession of the suit land by the plaintiff and her family.
21. The last issue is costs. It is the 2nd defendant who sold the land to the plaintiff's late husband. He knew of his obligations. He ought to have ensured that the land was transferred to the deceased when the subdivision was being done. He however went out of his way to try and steal the land from the plaintiff by influencing the registered proprietor to transfer it into the name of the 1st defendant. If the 1st defendant abides by the order to transfer the suit land I will visit no order on costs upon her in which event the costs of this suit will be borne solely by the 2nd defendant. If she does not, then the costs of the suit will be shouldered jointly and/or severally by the 1st and 2nd defendants.
22. Judgment accordingly.

DATED AND DELIVERED THIS 2ND DAY OF APRIL 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :



Mr. Ochoki for the plaintiff

N/A on part of Mr. Godia for the defendants

Court Assistant – Michael Oyuko

