



**Ombidi v Omollo (Environment & Land Case 32 of 2021)
[2022] KEELC 13839 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 32 OF 2021
GMA ONGONDO, J
OCTOBER 31, 2022**

BETWEEN

PAUL JUMA OMBIDI PLAINTIFF

AND

BENARD ODHIAMBO OMOLLO DEFENDANT

(FORMERLY MIGORI ELC NO. 64 OF 2019 (O.S))

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Gem/Kajulu/49 measuring approximately one decimal two four hectares (1.24 Ha) in area (The suit land herein). The same is located within Homa Bay county.
2. The plaintiff is represented by the firm of Eric Mose & Company Advocates. Initially, the plaintiff was represented by the firm of Quinter Adoyo and Company Advocates.
3. The defendant is represented by the firm of GS Okoth and Company Advocates.
4. On November 17, 2020, counsel for both parties agreed by consent to treat the originating summon filed as a plaint and the replying affidavit as a statement of defence.
5. On September 30, 2021 the matter was transferred from Migori Environment and Land Court where it was originally lodged, to this court for hearing and determination.

B. Summary of the Parties' Respective Cases

6. On August 26, 2019, the plaintiff, through his advocates, filed the present suit by way of an originating summons dated August 5, 2019. The same was brought pursuant to sections 1A, 1B and 3A of the



Civil Procedure Act, Chapter 21 Laws of Kenya, order 37 rule 7 of the Civil Procedure Rules, 2010 and sections 17 and 38 of the Limitations of Actions Act chapter 22 Laws of Kenya.

7. The plaintiff has sought the orders infra:
 - a. That the plaintiff has acquired title to the suit land by adverse possession.
 - b. An order of rectification of the register directing the Land Registrar of Homa Bay to delete the name of Benard Odhiambo Omollo and substitute it by the name of Paul Juma Ombidi as the proprietor of the suit land and the plaintiff be issued with the title deed in respect of the suit land.
 - c. An order vesting title of the suit land in the name of Paul Juma Ombidi as absolute proprietor and that all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.
 - d. Cost of this suit.
8. The originating summons is anchored on a sixteen (16) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff contends that he has been in occupation of the suit land since 1998 up to date and has tilled the land, buried his loved ones and planted trees thereon. That therefore, he has acquired the suit land by way of adverse possession. The plaintiff avers that one Henry Omollo (deceased) who is the father to the defendant, and who transferred the suit land to the defendant, procured registration of the suit land in his name through misrepresentation, fraud and/or deceit.
9. The plaintiff laments that in 2014 the defendant filed a suit at the Chief Magistrate's Court in Homa Bay (Environment and Land Case Number 23 of 2014) seeking, among others, to evict the plaintiff from the suit land. He therefore, urged the honourable court to grant the orders sought in the originating summons.
10. The plaintiff herein, Paul Juma Ombidi (PW1), testified on February 1, 2022 and relied on his witness statement dated August 15, 2019 as part of his evidence. He stated, *inter alia*, that he was born and lives on the suit land and that his grandparents are buried thereon. That he has been continuously living on the suit land since 1998 without authorization by any party. That the defendant is the registered proprietor of the suit land. PW1 relied on documents marked as PJO1 and PJO2 attached to his supporting affidavit sworn on August 5, 2019, three photographs in the list of documents dated August 5, 2019 as well as certificate of electronic evidence dated November 10, 2020 as per his further list of documents of even date (PExhibits 1, 2, 3(a), (b), (c) and (d) respectively).
11. During cross-examination, PW1 admitted that he was under 10 years old when adjudication was carried out in Gem area hence, he did not know much about it. That the suit land was originally registered in the name of his late father, Gabriel Ombidi (deceased), on May 15, 1968. That on October 1, 1971, the suit land was registered in the name of Henry Omolo. That his late father built on the suit land and his mother was buried thereat. He further stated that the defendant instituted a suit against him in Homa Bay Chief Magistrate's Court Civil Case No 23 of 2014 for trespass but that suit was stayed.
12. PW2, Mary Awuor, the plaintiff's wife testified on the same day and adopted her statement dated August 5, 2019 as part of her evidence. She stated that they have lived on the suit land since 1998. In cross-examination, she stated that she was not aware how Gabriel Ombidi and Henry Omolo acquired the suit land.



13. PW3, Jacob Okuma Otieno, adopted his statement dated August 5, 2019 as part of his evidence. During cross-examination, he stated that the plaintiff has planted trees and crops on the suit land. That he cultivates it. In re-examination, the witness clarified that the plaintiff entered the suit land in 1998 and has been in possession and occupation of the same since then.
14. PW4, Martin Onyango Abuya, adopted his statement dated August 5, 2019 as part of his evidence. He stated in cross-examination that the plaintiff is his neighbor and that he has never told him that the suit land is registered in another person's name.
15. PW5, Fredrick Omondi Otieno, a social worker and neighbor of the plaintiff, adopted his statement dated August 5, 2019 as part of his evidence. It was his evidence that he has never witnessed any person evict the plaintiff from the suit land.
16. The defendant opposed the suit *vide* a replying affidavit dated January 5, 2022 and lodged on January 24, 2022. He asserted that he is the registered proprietor of the suit land, having been gifted the same by his late father Henry Omollo Odeko (deceased). He stated that the plaintiff entered into the suit land in the year 2013. That as a result, he instituted a suit against the plaintiff for his forceful eviction therefrom at Homa Bay Law Courts in Land Case No 23 of 2014, which suit has been stayed pending the outcome of the present suit. That therefore, the plaintiff has not satisfied the requirements to sustain a claim of adverse possession of the title of the suit land. He thus, urged the honourable court to dismiss the present suit with costs.
17. DW1, Benard Odhiambo Omollo (the defendant herein), testified on February 28, 2022 and adopted his replying affidavit sworn on January 5, 2022 as part of his evidence as well as annexed documents "BOO-1 to BOO-4B" which were admitted into evidence and marked as DExhibits 1 to 4B respectively. He testified that his late father transferred the suit land to him in the year 2013 and that there was nobody living thereon at the time. During cross-examination, DW1 stated that he has not been living on the suit land since 2013 to date.
18. DW2, Beatrice Auma Omollo, the defendant's mother, adopted her statement dated February 7, 2022 as part of her evidence. On cross-examination, DW2 admitted that the defendant has never used the suit land.
19. That being the close of the parties' respective cases, the honourable court directed parties to file and exchange submissions.
20. Accordingly, learned counsel for the plaintiff filed submissions dated March 15, 2022 on March 21, 2022 and framed a single issue for determination, to wit, whether the plaintiff has acquired the suit parcel of land by adverse possession? Counsel submitted that the plaintiff entered into the suit land in the year 1998, and has been in occupation to date. That no person authorized him to use the land. That he has built his home and buried his loved ones thereon. That therefore, the plaintiff has acquired title to the suit land by way of adverse possession. Counsel relied on various authorities including the case of *Wilson Kazungu Katanan & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, to fortify his submissions.
21. Learned counsel for the defendant filed submissions dated March 28, 2022 on March 29, 2022 and identified three issues for determination thus: whether the plaintiff has been in continuous, peaceful, open, hostile and exclusive possession of the suit land; and if so when did the occupation or possession commence? Whether the plaintiff has proved that the registered owner, Henry Omolo Odeko, was made aware of the plaintiff's presence on the suit land; and who is to pay the costs of this suit?



22. Counsel submitted that DExhibit 3 (BOO-3) shows that in 1998 the plaintiff built a house on the suit land but the District Officer Rangwe ordered him to vacate the same. That according to the defendant, he vacated but only returned thereon in the year 2013 and was sued in court in the year 2014. That therefore, the plaintiff has not been in continuous possession of the suit land since 1998 as pleaded. Counsel cited various authorities, including the case of *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR to buttress his submissions.

C. Issues for Determination

23. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd vs Falcon Grounds Ltd* (2000) 2 EA 385.
24. I have duly considered the entire originating summons, the testimonies of PW1 to PW5 and the plaintiff's submissions as well as the testimonies of DW1 and DW2 and the defendant's submissions. So, the issues for determination are as captured in the case of Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakshein and another (supra) that adverse possession dictates thus;
- a. The parcel of land must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

D. Discussion and Determination

25. It must be noted that the plaintiffs' claim is for the whole of land reference numbers Gem/Kajulu/49 measuring approximately one decimal two four hectares (1.24 Ha) in area, the suit land herein. Therefore, the plaintiff's claim is over a definite portion of land; see *Muthuita vs Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
26. On the issue of registration, PW1 stated that titles to the suit parcels of land are registered in the name of the defendant. He produced in evidence, a copy of the title deed and green card which revealed that the defendant is the proprietor of the suit land with effect from December 18, 2013.
27. As regards open and exclusive possession of the suit land, it is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachio vs Martin Okioma Nyauuma and 3 others* (2017) eKLR.
28. PW1 testified that he has been in occupation of the suit parcels of land since 1998. That he lives and has buried his loved ones thereat. That he has planted trees and cultivates the suit land. This is discerned on ground (a) and (d) of the originating summons and his testimony. This evidence was also corroborated by the plaintiff's witnesses. Notably, DW2 admitted in cross-examination that the defendant has never used the suit land.
29. Regarding the third dictate, PW1 stated that he has been in occupation of the suit land since 1998 to date. However, the defendant contends that in the year 1998, the plaintiff built a house on the suit land but the District Officer Rangwe ordered him to vacate. That the plaintiff vacated the suit land and only returned thereon in the year 2013, prompting the defendant to institute proceedings at the Chief Magistrate's Court in Homa Bay (Environment and Land Case Number 23 of 2014) seeking, among others, to evict the plaintiff from the suit land. That therefore, the plaintiff has not been in continuous



possession of the suit land since 1998 as pleaded. The defendant produced in evidence, a letter from chief to the District Officer dated September 23, 1998 concerning the land dispute.

30. It is noteworthy that the defendant has never filed an eviction notice against the plaintiff. This was clearly stated by PW5. The defendant filed a suit at the Chief Magistrate's Court in Homa Bay (Environment and Land Case Number 23 of 2014) seeking, among others, to evict the plaintiff from the suit land. This suit was, however, filed in 2014, sixteen (16) years after the plaintiff entered into the suit land. Clearly, the plaintiff has been in possession of the suit land for a period in excess of 12 years.
31. It is my considered view that the plaintiff has demonstrated that he has been in peaceful and continuous enjoyment and use of the suit parcels of land in excess of twelve years. So, the defendant has been dispossessed thereby; see *Halsbury's Laws of England 4th Edition Volume 28*.
32. Section 107 of the *Evidence Act* chapter 80 Laws of Kenya provides that he who alleges must prove; see also Wilson Kazungu Katana case (supra).
33. In *Kirugi and another vs Kabiya and 3 others* (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities.
34. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendant on a balance of probabilities. He is entitled to the orders sought in the originating summons.
35. Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders 1, 2, 3 and 4 sought on the face of the originating summons and as stated in paragraph 5 (a), (b), (c) and (d) hereinabove.
36. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 31ST DAY OF OCTOBER 2022

G.M.A ONG'ONDO

JUDGE

Present

1. Ms. A. Odera holding brief for the plaintiff's counsel
2. Mr. A. Ogutu holding brief for the defendant's counsel
3. Okello and Mutiva- Court Assistants

