



**Okara v Onyinkwa (Environment & Land Case 13 of 2021)
[2022] KEELC 14572 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 13 OF 2021
JM KAMAU, J
OCTOBER 27, 2022
(FORMERLY KISII ELC CASE NO. 441 OF 2013)**

BETWEEN

PETER RIECHI OKARA APPLICANT

AND

MARUBI ONYINKWA RESPONDENT

JUDGMENT

1. The Plaintiff, Peter Riechi Okara sued the Defendant, Marubi Onyinkwa in the former's capacity as the Legal Representative of the late Kibagendi Isoe who is the registered Proprietor of the Parcel of Land known as parcel No. West Mugirango/bosamaro/1030. It is the Plaintiff's case that in 1969 the late Kibagendi bought L.R. No. West Mugirango/bosamaro/1029 from one Kayaga Onyinkwa, a brother to the Defendant after which he planted tea bushes on both parcels which are adjacent to each other. Kayaga Onyinkwa then moved to Tanzania but he never transferred the land to Kibagendi when he came back and died later in 1981. He was buried on a different parcel of land belonging to his brother. The late Kibagendi Isoe died in 1997 after having lived on West Mugirango/bosamaro/1029 uninterrupted and peacefully since he took its possession in 1970. In may 2012 the Defendant forcefully chased the Plaintiff's workers away from the suit property alleging that the land belonged to his late brother, Kayaga. The Plaintiff therefore prays for the following: -
 - a. A declaration that land Parcel No. West Mugirango/bosamaro/1029 was effectively transferred to the late Kibagendi Isoe in 1969 and remains the property of the said Kibagendi Isoe.
 - b. An Order directing the Land Registrar to rectify the register to have the land registered in the Plaintiff's name.
 - c. Costs of this suit.



- d. Any other or further relief and the Court may deem fit to grant.
2. In his statement accompanying the Plaint, the Plaintiff solidified his case by repeating the above averments. Kibagendi's cousin one Oeta Mogeni aged 97 years, his grandson Zaphania Ondiru Oendo and a former worker of the Plaintiff, one Teresa Bosibori Okera also filed their witness statements on 5/11/2013.
 3. On November 20, 2013, the Defendant filed a Defence in which he denied the Plaintiff's case generally and more particularly that the late Kayaga Onyinkwa sold L.R. West Mugirango/bosamaro/1029 to the late Kibagendi Isoe. He also stated that he does not represent the Estate of Kayaga Onyinkwa since he does not hold the letters of administration in respect to the latter's' Estate. He further averred that the late Kibagendi Isoe never took possession of the parcel No. West Mugirango /bosamaro/1029 and was never evicted from the suit premises. He never developed the suit land and has never lived thereon. The Defendant finally states in his Defence that the late Kibagendi Isoe never acquired any interest in the suit parcel. He also filed a list of witnesses where he named himself as a witness and "*others to be named*".
 4. While the case was still pending hearing, the Defendant passed on on 30/3/2018 and the Plaintiff made an Application on 5/12/2019 to substitute him with 10 of the deceased Defendant's sons on the following grounds:
 1. That the Plaintiff/Applicant is the legal representative of Kibagendi Isoe, the registered proprietor of land parcel No. West Mugirango/ Bosamaro/1030.
 2. That the said Kibagendi Isoe also purchased land parcel No. West Mugirango/bosamaro/1029 from the registered owner Kayaga Onyinkwa in 1969 and the said Isoe amalgamated the two parcels and planted tea bushes on both plots.
 3. That the said Kibagendi used the two plots until his death in 1997.
 4. That the Plaintiff/Applicant took over the cultivation and possession of the two parcels until May 2012 when the Defendant (now Deceased) interrupted by claiming land parcel No. West Mugirango/ Bosamaro/1029.
 5. That the Respondents have trespassed into the suit land and have physically made boundaries.
 6. That the Respondents are the sons of the Defendant (now Deceased).
 7. That the Plaintiff/ Applicant stands to suffer irreparable loss if the Respondents are not made parties and restrained from further interference.
 8. That the Respondents will not suffer any prejudice if they are made parties and restrained from further interference of the suit property until the final determination.
 9. That it is fair, just and equitable that this Application be granted.
 5. The Defendant's Counsel objected and informed the court that they were in the process of taking out letters of administration ad litem after which he would make an Application for substitution. Eventually on 13/3/2020 an Application was made and filed on 5/11/2020 praying that Peter Marubi Ong'era and Benard Nyanchiro Onyinkwa do substitute the Defendant. The same was granted on December 16, 2021 and consequently the 2 filed their statements and the Defence was amended to reflect this change, ready for hearing which commenced on 19/7/2022.



6. PW1 Peter Riechi Okara testified by adopting his statement of 4/11/2013 as his evidence in chief. He said that he is the son of the late Kibagendi Isoe who bought West Mugirango/bosamaro/1029 in 1969. The land belonged to Kayaga Onyinkwa and is adjacent to his other land West/bosamaro/1030. He immediately after buying the suit land from Onyinkwa took possession of the same. He then amalgamated the 2 parcels of land and planted tea on both in 1970. His father, the late Kibagendi then died in 1997. The Defendant, a brother to Kayaga started complaining and even took the Plaintiff to the area Chief in 2012 claiming that the Plaintiff had trespassed on his brother's (Kayaga's) land. The Plaintiff said that although the land No. West Mugirango/bosamaro/1029 has never been transferred to his late father, he still occupies it since 1969. He testified that when Kayaga came back from Tanzania in the late 1970s where he left for in 1979 after selling the suit land, he settled with his brother Marubi Ong'era Onyinkwa till he died in 1987. In 1997 the Defendant came and took a portion of WestMugirango/bosamaro/1029 interrupting the Plaintiff's possession of the same. When cross-examined by Mr. Nyaberi for the Defendant, Mr. Okara said he was not aware of any succession cause over the Estate of Onyinkwa. He said he was 18 years when the transaction was taking place and that he has nothing to show over the transaction. He was also not present when the same was taking place. He also said that in April 2022 the Defendant's son came with a panga to chase his workers from the land. He said that he has been severally chased away from the land together with his family. On re-examination, the witness said that upon his father's death his mother continued cultivating the land and that his father had planted some trees on West Mugirango/ Bosamaro/1029 before he died. To support his case, he produced the following documents:
 1. Copy of official search parcel West Mugirango/bosamaro/1029.
 2. Death certificate of Kayaga Onyinkwa deceased who died on 1st January, 1981.
 3. Survey map for West Mugirango Bosamaro registration section.
7. PW2 Zaphania Ondimu Oendo aged 70 testified and adopted his statement filed in court on 5/11/2013. He said that he knew the late Onyinkwa and that he worked on the suit land for over 10 years as an employee of the late Kibagendi, the father to the Plaintiff as a tea picker while also taking care of the trees thereon. He testified that Onyinkwa had sold his land to several other people and that after selling the suit land to the Plaintiff's father, he went to live in Tanzania but during his last days he came back and lived on his brother's (the Defendant's father's) land where he was buried. On cross-examination by Mr. Nyaberi for the Defendant, Mr. Oendo said he was not involved in the sale transaction between Kibagendi and Kayaga. He confirmed that Kayaga was not buried on the suit land but on his brother's and that the Ong'eras have another parcel of land in the neighbourhood.
8. DW1 Peter Marubi Mangera adopted his statement of 30/3/2022. He said that he is a co-administrator of the Estate of the late Marubi Ongera Onyinkwa and a nephew of Kayaga Onyinkwa, the registered owner of L.R. No. West Mugirango/bosamaro/1029. His father was the late Marubi Onyinkwa. He testified that there has never been any probate obtained in respect of the Estate of Kayaga and that his late father, Marubi Onyinkwa has been in continuous occupation of their uncle's land and that the Plaintiff's family never purchased it. He testified that by the time Kayaga died in 1981 he was 14 years old and that Kayaga was buried on West Mugirango/bosamaro/1029. Kayaga was not married and had only 1 sibling, the late Marubi Onyinkwa. He produced a copy of the official search in respect of West Mugirango/bosamaro/1029 dated 23/5/2012 showing that the land is still in the name of Kayaga Onyinkwa, Kayaga's certificate of death showing that he died on 1/1/1981 aged 55, and a survey map for the West Mugirango/west Bosamaroregistration area.
9. On cross examination by Mr. Masese, the witness said that the late Kayaga had 10.9 Hectares and that he is also the same person who had sold West Mugirango/bosamaro/1030 to Kibagendi. He could not



tell who had planted the tea on WestMugirango/west Bosamar/1029 but that it is his late father who was picking it. There are also trees about 3 years old but that he is the one who planted them. Having been born in 1974 he is now 48. On re-examination Mr. Mangera admitted that PW2 Zephania worked for the late Kibagendi but on West Mugirango/bosamaro/1030 and that when the Plaintiff came to pick tea on the West Mugirango/ Bosamaro/1029 they did chase him away and that he has never been furnished with any proof of the sale of West Mugirango/bosamaro/1029.

10. The last Defence witness, Benard Nyacheo Onyinkwa, a business man agreed with his brother's Peter Marubi Onyinkwa's witness statement dated 30/3/2022 which he wished to rely on and stand by. He also confirmed that he stood by the exhibits produced by DW2 but that it is not true as DW2 said that the tea on West Mugirango/bosamaro/1029 is not of the same age with that on West/ Bosamaro/1030. He confirmed that both are of the same age since it was all planted at the same time and he saw a note book in their home where their father had indicated when the tea was planted which also indicated where his father wished to be buried. He saw the note book last in 2013 and did not come to court with it since he was not asked to carry it. Unlike his co-witness, he also testified that Kayaga was not buried on West Mugirango/ Bosamaro/ 1029. But later on, he said that PW2 must have lied when he testified that Kayaga was not buried on West Mugirango/bosamaro/1029. He also said that he does not know whether to believe the Plaintiff when the latter said that the tea was planted by his father (Kibagendi) because by then he had not been born. On re-examination he said that he has never seen the sale documents. While answering questions from the court, Mr. Nyachieo said that all the documents, that have to do with Kayaga's affairs were left in the custody of his late father, Ongera.
11. After the close of the case I invited parties to file their written submissions but only the Plaintiff's submissions were filed on 6/10/2022 which I have considered.
12. From a careful perusal of the case, the evidence adduced and Plaintiff's submissions the main legal issue arising for determination is: whether the land could have been sold to the late Kibagendi. The agreement was unwritten hence an egregious infraction of the statutory requirement as to sale agreements and it is crucial to examine whether such an agreement could confer any legal rights.
13. Section 38 (1) provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.
14. Likewise, the [Law of Contract Act](#), Chapter 23 of the Laws of Kenya provides in Section 3 that:
 - "No suit shall be brought upon a contract for the disposition of an interest in land unless-
 - (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
15. In Civil Appeal Number 22 of 2013, [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR, the Court held;

"Section 3(3) of the [Law of Contract Act](#) provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the [Law of Contract Act](#) excludes the application of



Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on June 1, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

16. The 2 conditions above must not all be there. They are ‘either’ ‘or’ and not ‘and’.

In the instant case even if there was no sale agreement, the Plaintiff had only to satisfy the Court that he had been in possession. The Plaintiff, and previously his father, Kibagendi, remained in possession of L.R. No. West Mugirango/ Bosamaro/ 1029 since 1969 but unfortunately (in his own words) until his workers’ possession was interrupted by the said Marubi Ongera Onyinkwa in 2012 from some and not all of the suit land. I believe the Defendant took advantage when he realized that his late brother, Kayaga Onyinkwa had not transferred the suit land to the Plaintiff’s father, Kibagendi Isoe by the time both died.

17. Notwithstanding the fact that the sale agreement made by the parties in 1969 was not in writing, all that the Plaintiff had to do is to satisfy the court that his late father either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence I find that the Plaintiff proved that he and his father had actual and or constructive possession of the suit property since 1969 and the possession was open, uninterrupted until 2012.

18. I find that the proviso to Section 3 (3) of the Law of Contract Act also applies in this case but even more importantly, Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force and I hold that the sale agreement between the Plaintiff’s father and the Defendant’s brother did not violate or offend the provisions of the Law of Contract Act.

19. In the premises, I find that the Plaintiff has proved his case on a balance of probabilities and the Defendants and his witnesses seem to know nothing about the suit land hence the contradiction between the 2nd and 3rd Defendant’s witnesses and I pronounce Judgment as follows:

a. A declaration be and is hereby issued that land Parcel No. West Mugirango/bosamaro/1029 was effectively purchased and legally acquired by the late Kibagendi Isoe in 1969 and remains the property of the said Kibagendi Isoe.



b. An Order be and is hereby issued directing the Land Registrar to rectify the register in respect to the land Parcel No. West Mugirango/bosamaro/1029 so that the same is registered in the Plaintiff's name to hold the same in trust for and as a Legal Representative of the Estate of Kibagendi Isoe until the same is distributed to its rightful beneficiaries.

c. The Costs of this suit shall be awarded to the Plaintiff against the Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF OCTOBER 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Kennedy/Orora

Plaintiff: Mr. Masese

Defendants: Mr. Nyaberi

