



**Muholo v Omoro (Environment & Land Case 36 of 2021)
[2022] KEELC 14713 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 36 OF 2021
AY KOROSS, J
NOVEMBER 10, 2022**

BETWEEN

ZIPPORAH MUHOLO PLAINTIFF

AND

WILLIAM OCHIENG' DANIEL OMORO DEFENDANT

JUDGMENT

Introduction

1. By an originating summons dated July 30, 2020, the plaintiff instituted suit against the defendant who is the registered proprietor of land parcel registration number South Ugenya/Yiro/1462 hereinafter “suit property”. She contended that she was an adverse possessor and raised the following issues for determination by this court;
 - a. If the defendant was the registered proprietor of the suit property;
 - b. If the plaintiff had been in occupation, use and continuous uninterrupted possession of the suit property;
 - c. If such occupation, use and continuous uninterrupted possession of the suit property had been in excess of a period of 12 years in an open and peaceful manner;
 - d. If the registration of the defendant as the proprietor of the suit property was subject to prescriptive rights;
 - e. When did time to constitute a claim of adverse possession start to run; and
 - f. In view of (a)–(e) above, had the plaintiff acquired the suit property by way of adverse possession.



Plaintiff's evidence

2. The summons was supported by the affidavit of the plaintiff which she adopted as her evidence in chief. She annexed attachments thereto which were inter alia, a greencard of the suit property, an affidavit filed by the plaintiff in Kisumu High Court Misc Civil Application No 298 of 2009, proceedings of Siaya Land Disputes Tribunal Case No SYA/22/2002 and lower court proceedings adopting the tribunal's judgment. She produced these documents in support of her case.
3. She deponed, *inter alia*, her deceased husband one Elkano Oduor Wamira ("deceased") and his family had lived on the suit property for a long period of time and when she got married in 1970, she resided on the suit property. At the time the tribunal rendered its determination, the defendant's claim was statutory barred and her prescriptive rights had crystalized by operation of law.
4. During cross-examination, she testified that she had sued the defendant because he fell trees on the suit property and her occupation had not been peaceful.
5. In opposition to the originating summons, the defendant filed a replying affidavit dated February 25, 2022. His attorney Stanley Opondo Ochieng adopted the affidavit of the defendant as his evidence in chief. He deponed inter alia, the suit had been the subject of numerous court determinations to wit Kisumu High Court Misc Civil Application No 298 of 2009, Siaya Case No 22 of 2002 and Siaya PMC Case No 39 of 2003 all of which had not been reviewed or appealed against. The suit was frivolous and vexatious. The plaintiff was not an adverse possessor and he had been in occupation and possession. The plaintiff had failed to comply with court orders. He urged the court to dismiss the plaintiff's suit with costs.
6. In cross examination, he testified that indeed the parties had previously litigated over the suit property in several other suits.

Parties written submissions.

7. As directed by the court, the defendant's Counsel M/s Ikhumba filed her written submissions dated April 12, 2022. Counsel asserted that the plaintiff had proved her case. She asserted that previously, the plaintiff could not prosecute her claim of adverse possession because the tribunal did not have jurisdiction. Counsel placed reliance on the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR which was cited with approval in the case of *Argos Furnishers Limited v Samuel Musila & 37 others* [2020] eKLR where the court had this to say;

"Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years."
8. The defendant's Counsel M/s Onono filed her written submissions dated August 25, 2022. Counsel submitted that adverse possession was well settled and two principles had been envisaged; possession and discontinuance of possession and she placed reliance on the case of *Wambugu v Njuguna* (1983) KLR 173.
9. Counsel submitted that it was evident that the plaintiff had not resided on the suit property and from the testimony, there had been several suits between the parties which were before this court. That if the plaintiff's rights had accrued prior to the tribunal rendering itself, nothing could have stopped her from filing a suit.



Analysis and determination

10. I have considered the parties' pleadings, evidence and submissions and, in my considered view, the issues falling for determination are; (i) whether the suit was res judicata (ii) if (i) was in the negative whether the plaintiff proved that she was an adverse possessor (iii) what appropriate orders should be granted? and (iv) who should bear the costs of this suit? I will now proceed to deal with the issues sequentially.
11. Section 7 of the *Civil Procedure Act* states as follows on the doctrine of *res judicata*;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
12. Section 23(3)(e) of the *Interpretation and General Provisions Act* preserves and protects decisions and awards made by the defunct land disputes tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Tribunal ACT. See also the Supreme Court of Kenya decision in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2015] eKLR.
13. None of the parties' Counsel addressed this issue in their pleadings or submissions but from the evidence adduced, it is evident that the issues obtaining in this suit had been the subject of litigation for several years.
14. From the record, the plaintiff frustrated the defendant's efforts to execute judgment in Siaya PMC Case No.39 of 2003. After the lapse of 12 years from the date of judgement, she filed a notice of preliminary objection in Siaya PMC Case No 39 of 2003 by invoking Section 4 (4) of the *Limitation Of Actions Act*. The lower court in its ruling rendered on July 9, 2020 observed that its proceedings had been dragged at the instigation of the plaintiff (defendant in the lower court case). It dismissed the objection and issued directions on the hearing of a notice to show cause. An application to stay the proceedings of the lower court was disallowed by this court.
15. Less than a month after the lower court had rendered itself, and well knowing that her spirited efforts had come to a naught, the plaintiff filed the instant suit.
16. Only two sets of proceedings were tendered by the plaintiff as evidence; the tribunal's and that of Siaya PMC Case No 39 of 2003. The latter adopted the former's decision as its judgment on March 14, 2006.
17. In Siaya PMC Case No.39 of 2003, the suit property was the subject of litigation and the plaintiff herein was the then defendant whilst the defendant herein was the plaintiff. The judgment found the defendant herein was the owner of the suit property and further found that the plaintiff was an illegal occupier. An order of vacation was issued against the plaintiff.
18. The case before the tribunal was heard and determined on merits and both the plaintiff and defendant were given an opportunity to put forth their case. The dispute was determined by a competent tribunal and its decision was adopted as a judgment of the court. The same issues that had been raised in the previous suit have once again sufficed in this suit. In the absence of an appeal or a review setting aside or quashing the decision of the tribunal or the judgment in Siaya PMC Case No.39 of 2003, I find this suit res judicata. However, before I pen off, I must address the plaintiff's conduct.



19. The plaintiff well knowing the doctrine of res judicata would suffice and in an attempt to circumvent it, couched her pleadings to validate that her claim by making averments that at the time the defendant filed suit before the tribunal, her claim had crystallized.
20. Even if the prayers in the two suits were different because rival parties had different interests, the net effect would be the same. It would have settled the issue of ownership and occupation of the suit property. Courts are called upon to be extra vigilant to weed out such cases that are tantamount to being an abuse of the court process and to this end, I rely on the case of *E.T v Attorney General & Another* (2012) eKLR where Majanja J expressed himself thus on this issue: -

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”

It is my finding that this suit is a blatant abuse of the court process. I need not say more.

21. For reason that I have already found that this suit is *res judicata* and an abuse of the process of court, it is my ultimate finding that the suit is unmeritorious. It is trite law that costs follow the event. I hereby dismiss the plaintiff's suit with costs to the defendant.

DELIVERED AND DATED AT SIAYA THIS 10TH DAY OF NOVEMBER 2022.

HON. A. Y. KOROSS

JUDGE

10/11/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

M/s Amano for the defendant

N/A for the plaintiff

Court assistant: Ishmael Orwa

