



**Masud v Abdi (Environment & Land Case 19 of 2021)  
[2022] KEELC 15383 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15383 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 19 OF 2021  
GMA ONGONDO, J  
DECEMBER 8, 2022  
(FORMERLY MIGORI ELCC NO. 139 OF 2017)**

**BETWEEN**

**ABDUL OKOTH MASUD ..... PLAINTIFF**

**AND**

**ISHA NGOMA ABDI ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The central property in the present dispute is land reference number Central Karachuonyo/ Kanyadhiang/70 measuring approximately Two Decimal Four hectares (2.4 Ha) in area (The suit property herein). The same is contained in Registry Map Sheet Number 10 and located within Homa Bay County.
2. The plaintiff is represented by the firm of Robert Ochieng and Company Advocates.
3. The defendant is represented by the firm of Achillah TO and Company Advocates,
4. The suit was transferred from Migori Environment and Land Court to this court on October 4, 2021 for hearing and determination.

**The Plaintiff's Case**

5. Briefly, the plaintiff's complaint is that he is the registered proprietor of the suit land. That the defendant unlawfully entered thereupon, cultivated the same and erected a homestead thereon without the plaintiff's consent thus, precipitating this suit.
6. So, the plaintiff commenced the suit by a plaint dated January 4, 2017 and lodged in court on January 5, 2017, seeking the following orders;



- a. A declaration that the suit land belongs to the plaintiff absolutely and an order evicting and restraining the defendant from interfering therewith.
  - b. Costs.
  - c. Interest.
7. The plaintiff (PW1) testified that he is the registered proprietor of the suit land. That the defendant entered into and erected a homestead thereon without any colour of right. He relied on, *inter alia*, his statement dated January 4, 2017 and filed in court on January 5, 2017 and the annexed documents serial numbers 1 and 2 (DExhibits 1 and 2) namely a copy of green card and a copy of title deed in respect of the suit land respectively.
  8. By a reply to defence and a defence to counterclaim dated October 30, 2021 and duly filed on November 4, 2021, the plaintiff/defendant to the counter claim stated, in the year 2009, he allowed the defendant to enter the suit land to till a portion thereof. That however, the defendant went ahead and built a semi-permanent house thereon without his knowledge, among other things. In that regard, the plaintiff denied the counter claim and sought that that the same be dismissed and that judgment be entered in terms of the prayers in the plaint.
  9. In the submissions dated November 22, 2021, the counsel for the plaintiff/defendant to the counter claimer gave the gist of the parties' respective cases, cited sections 25 (1) and 26 (1) of the [Land Registration Act, 2016 \(2012\)](#), section 107 of the [Evidence Act](#) (Chapter 80 Laws of Kenya) and urged the court to enter judgment in terms of the plaint but dismiss the counter claim with costs. To fortify the submissions, counsel cited [Black's Law Dictionary](#) 8th Edition at page 59, the case of [Jennifer Nyambura Kamau-vs-Humphrey Nandi](#) (2013) eKLR and Megary and Wade, [The Law of Real Property](#), among others.

### **The Defendant's Case**

10. By a statement of defence and counter claim dated March 1, 2017 and filed herein on March 2, 2017, the defendant denied the plaintiff's claim and stated that the plaintiff is a stranger to him. That he lawfully acquired the suit land from his (defendant) father, Abdi Ongor Ouya Masoud in the year 2001. That his said father had lawfully acquired the same from one Baraka Onyango Masud (Deceased) who was the registered proprietor thereof.
11. The defendant further stated that he took possession of the suit land in the year 2001. That he has since planted trees and established a home thereon hence acquired it by way of adverse possession.
12. In that regard, the defendant has sought that;
  - a. The plaintiff's suit be dismissed with costs.
  - b. There be a declaration that the defendant is entitled to the suit land by way of adverse possession and the Land Registrar be directed to alter the register and issue a title to the defendant.
13. The defendant (DW1) stated that he has lived on a portion measuring zero decimal three hectares (0.3Ha) of the suit land since the year 2001. That he planted trees thereon and cultivates the same. He relied upon title deed (DExhibit 1), certificate of official search (DExhibit 2) and DExhibits 5 to 9 as per his list of documents dated March 1, 2019 serial numbers 5 to 9 respectively.



14. DW2 was Abdi Ongol Ouya Masud who testified and relied on his statement dated March 1, 2017 as part of his evidence. He stated that he signed an authority from Baraka Onyango Masud herein (DExhibit 4).
15. The defendant's counsel did not file submissions in this suit.

### **Issues for Determination**

16. It is established law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Company Ltd-vs-Falcon Guards Company Ltd* (2000) 2 EA 385 as restated in the case of *Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority* (2009) KLR 720 as well as Order 15 of the *Civil Procedure Rules, 2010*.
17. In the foregone, I am of the considered view that the following issues arise for determination;
  - a. Is the plaintiff the absolute proprietor of the suit land?
  - b. Is the defendant a trespasser on the suit land or has he acquired the same by way of adverse possession? and
  - c. Are the parties entitled to the orders sought in their respective pleadings?

### **Analysis and Determination**

18. As regards the first issue, PW1 stated that he is the registered proprietor of the suit land. In his examination in chief, he stated-

“According to PExhibit 2, the suit land was registered in my name on September 13, 2016....”
19. On his part, DW1 told the court in examination in chief that-

“....Deceased 1 (Ali Otieno Masud) was the registered proprietor of the suit land as per title deed given on March 18, 1991 (DExhibit 1).....”
20. This court is not unaware of the meaning of the terms; “Register” and “Proprietor” under section 2 of the *Land Registration Act, 2016 (2012)*.
21. The register (PExhibit 2) reveals that PW1 is the registered proprietor of the suit land. Further, the same shows that title deed was issued to him on September 13, 2016.
22. Sections 24, 25, 26 and 30 of the *Land Registration Act, 2016 (2012)* on interest conferred by registration, rights of proprietor, conclusive evidence of proprietorship and certificate of title respectively, are quite instructive herein. By PExhibits 1 and 2, the plaintiff is the proprietor of the suit land subject to the limitations under sections 25, 26 and 28 of the said Act.
23. On the issue of trespass, it is the contention of PW1 that DW1 unlawfully entered the suit land which he is in occupation and possession. Clearly, section 152 A of the *Land Act, 2016 (2012)* prohibits unlawful occupation of private land.
24. *Clerk and Lindsell on Torts* 13<sup>th</sup> Edition paragraph 18-01 has fashioned a definition for “Trespass” thus;

“An unjustifiable entry by one person upon the land in possession of another...”



25. The protection of right to property is anchored on Article 40 (1) of the *Constitution of Kenya, 2010*. However, the interests and rights of a proprietor are subject to Article 40 (3), (4) and (6) of the same *Constitution* as well as the overriding interests under sections 25 and 28 of the *Land Registration Act, 2016* (2012).
26. To this extent, the issue of trespass cannot be resolved without examining the doctrine of adverse possession which is an overriding interest under sections 25 (b) and 28 (h) (ibid). The doctrine is anchored upon sections 7, 13, 37 and 38 of the *Limitation of Actions Act* (Chapter 22 Laws of Kenya) and Order 37 Rule 7 of the *Civil Procedure Rules, 2010*.
27. Adverse possession has been raised in the defendant's pleading namely the counter claim as noted in *Bayete Co Ltd-vs-Kosgey* (1998) LLR 813. Therefore, no party is bound to be prejudiced by it as held in the case of *Boyes-vs-Gathure* (1969) EA 385.
28. It was the assertion of DW1 that he occupies 0.3 hectares of the suit land since the year 2001. That he has developed the same by way of planting trees and cultivation without any objection; see *Titus Ong'ang'a Nyachio -vs-Martin Okioma Nyauma and 3 others* (2017) eKLR and *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another* (2015) eKLR, among other authorities.
29. The defendant's assertion was affirmed by the plaintiff who stated in cross examination thus;  

“.....The defendant built on part of the suit land in August 2009.....”
30. On that score, the defendant has proved the dictates of adverse possession as held in *Nyachio and Kazungu* cases (*supra*) against the plaintiff as sought in the counter claim. Furthermore, as discerned in the evidence on record, the defendant is in possession of the suit land. So, he is not a trespasser thereon.
31. In the obtaining circumstances, is the plaintiff entitled to the orders sought in the plaint? Whereas this court is mandated under section 13 (7) (h) and (i) of the *Environment and Land Court Act, 2015* (2011) and section 152B and 152 G of the *Land Act, 2016* (2012) to grant declaration, eviction and costs as sought in the plaint, the orders are not available to him as the defendant has acquired title to the suit land by way of adverse possession.
32. To that end, it is this court's finding that the plaintiff has failed to establish his claim against the defendant on a balance of probabilities. On the other hand, the defendant has established to the requisite standards that he has acquired title to the suit land by adverse possession.
33. Thus, this court hereby renders the following final orders;
  - a. The plaintiff's suit mounted by way of a plaint dated January 4, 2017 and filed in court on January 5, 2017, be and is hereby dismissed with costs.
  - b. Judgment is hereby entered for the defendant/plaintiff against the plaintiff in terms of a declaration, alteration of the register and issue of title in respect of the suit land to the defendant as sought in the counter claim dated March 1, 2017 and lodged in court on March 2, 2017 and as set out at paragraph 12 (b) hereinabove.
34. Costs of the suit and the counter claim be borne by the plaintiff.
35. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 8<sup>TH</sup> DAY OF DECEMBER 2022.**



**G. M .A ONGO'NDO**

**JUDGE**

**PRESENT**

**Plaintiff**

**Ms Amondi, instructed by Mr Achillah T.O, learned counsel for the defendant**

