



**Sangira v Jandiko & 2 others (Environment & Land Case 11 of 2022)
[2022] KEELC 15376 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15376 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT & LAND CASE 11 OF 2022

GMA ONGONDO, J

DECEMBER 8, 2022

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION PURSUANT
TO SECTION 38 OF LIMITATION OF ACTIONS ACT**

AND

**IN THE MATTER OF: LAND REFERENCE NUMBERS SUNA
WEST/WASWETA II/3104, 3105,4569 AND 4570**

BETWEEN

JACKSON WASONGA SANGIRA PLAINTIFF

AND

SAMWEL BARAZA JANDIKO 1ST DEFENDANT

MARGARET AKEYO JANDIKO 2ND DEFENDANT

ELSEA ADOYO JANDIKO 3RD DEFENDANT

(FORMERLY MIGORI ELC (OS) No 163 OF 2017)

JUDGMENT

A. Introduction

1. At the outset, it is paramount to note that the [Constitution of Kenya, 2010](#) at Article 260 has fashioned the meaning for the term “Property” to include any vested or contingent right to, or interest in or arising from land. Further, the term “land” is defined thereunder to include the surface of the earth.
2. In the present suit, the portions of land in dispute comprise of land reference numbers Suna West/ Wasweta II/3104, 3105, 4569 and 4570 measuring approximately five decimal four four hectares (5.44 Ha), five decimal four four hectares (5.44 Ha), seven decimal five one hectares (7.51 Ha) and one



decimal two one hectares (1.21 Ha) in area respectively (The 1st, 2nd, 3rd and 4th suit parcels of land respectively). They are all contained in Registry Map Sheet number 47 and originated from land reference number Suna West/Wasweta II/ measuring approximately twenty hectares (20 Ha) in area (The original land herein).

3. The plaintiff, Jackson Wasonga Sangira is represented by the firm of Ochoki and Company Advocates.
4. The 1st, 2nd and 3rd defendants namely Samwel Baraza Jandiko, Margaret Akeyo Jandiko and Elsa Adoyo Jandiko respectively are represented by the firm of Kwanga Mboya and Company Advocates.
5. Originally, this suit was filed at Migori Environment and Land Court. Following the court's directions of April 19, 2019, the same was heard by way of *viva voce* evidence. On June 30, 2022, the suit was transferred to this court for determination

B. The Plaintiff's Case

6. By an originating summons dated July 17, 2015 and lodged in court on even date, the plaintiff has sued the defendants jointly and severally for;
 - a) A declaration that the defendants' rights to recover the 1st, 2nd, 3rd and 4th suit parcels of land is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and their titles thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the said suit parcels of land for a period exceeding 47 years.
 - b) There be an order that the plaintiff be registered as the proprietor of the 1st, 2nd, 3rd and 4th suit parcels of land in place of the defendants who currently hold the titles to the said parcels of land.
 - c) There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the 1st, 2nd, 3rd and 4th suit parcels of land, in any manner whatsoever and/or howsoever.
 - d) The Deputy Registrar and/or the Executive Officer of the Honourable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the 1st, 2nd, 3rd and 4th suit parcels of land in favour of the plaintiff, in the event of default by the defendants to execute the necessary transfer instruments.
 - e) Costs of this originating summons be borne by the defendants.
 - f) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
7. The plaintiff's claim is anchored on his affidavit of 22 paragraphs sworn on even date together with the documents including a certificate of search, registers and photographs annexed thereto as well as grounds (i) to (xvii) on the face of the originating summons. Briefly, the plaintiff's lamentation is that since his birth, he has resided on the original land registered in the name of Zachariah Jandiko Nyabogeni (Deceased) who was holding a portion thereof in trust for the plaintiff. That the defendants caused the original land to be registered in their names without the knowledge of the plaintiff who has made substantial developments thereon. That the plaintiff's occupation and possession of the 1st, 2nd, 3rd and 4th suit parcels of land, has been open, peaceful and continuous thus, extinguished the defendants' title thereto. That the plaintiff deserves to be registered as the proprietor thereof in lieu of the defendants.



8. The plaintiff (PW1) relied on his statement dated May 23, 2016 as part of his testimony. Furthermore, he relied upon the documents marked as “JWS 1 to 14” and annexed to the originating summons (PEXhibits 1 to 14 respectively). Also, in examination in chief, he stated in part-

“I seek orders of this court to have the suit land registered in my name. The same measures 20 acres.”

9. PW2, Silper Marienga Omuga relied on his statement dated May 23, 2016 as part of his evidence in chief. He testified, *inter alia*, that PW1 has lived on the original land since his birth.
10. In his testimony, the third witness, Selmina Okech (PW3) relied upon his statement dated May 23, 2016. He also testified that the suit land belongs to two brothers namely PW1 and the deceased, Zacharia Jandiko. That he witnessed the sub division of the original land between the two and that PW1 lives thereon.
11. PW4 was Silfanus Opilo Odiénya who relied on his statement dated May 23, 2016 as part of his testimony. He testified and emphasized, *inter alia*, that PW1 lives on the suit property.
12. By the plaintiff’s submissions filed herein on April 12, 2022, his counsel provided the background of the case inclusive of the plaintiff’s case as well as the defendant’s case and identified triple issues for determination, *inter alia*, whether the plaintiff’s occupation and or possession of the suit land has met the threshold for declaration of adverse possession. Counsel discussed the issues in favour of the plaintiff. To buttress the submissions, counsel relied upon authorities including *Benson Mukuwa Wachira v The Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR and *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] KLR, among others.

C. The Defendant’s Case

13. In a replying affidavit of 17 paragraphs sworn on January 4, 2016 by the 1st defendant for and on behalf of the 2nd and 3rd defendants and himself, the plaintiff’s claim is opposed. The defendants deposed, *inter alia*, that upon the demise of the deceased, they obtained the requisite letters of administration in respect of the estate of the deceased. That subsequently, it culminated into the 1st, 2nd, 3rd and 4th suit parcels of land in favour of the 1st, 2nd, 3rd defendants and PW1 respectively. They relied on true copies of the respective certificates of search marked as “SBJ 1 (a), (b) and (c) annexed to their replying affidavit.
14. Also, the defendants deposed that therefore, the plaintiff’s claim is defective to the extent that the same is based on the original land which does not exist. That the plaintiff’s claim is a mere afterthought, premature, defective, not proved and ought to fail.
15. The 1st defendant (DW1) testified by partly relying on his statement dated September 21, 2017 and his documents of even date serial numbers 1 to 12 (DEXhibits 1 to 12 respectively). In examination in chief, he stated, *inter alia*;
- “The suit parcels of land LR Nos Suna West/Wasweta II/3104, 3105, 4569 and 4570 belong to the 2nd, 3rd defendant, DW1 and PW1 respectively. The plaintiff’s suit is not valid.”
16. The 3rd defendant (DW2) and a widow of the deceased testified and relied on his statement dated September 21, 2017 as part of her evidence. She told this court that she confirmed the evidence of PW1 and PEXhibits 1 to 12 herein.



17. DW3 was the 2nd defendant who relied on her statement dated September 21, 2017. This witness testified that she affirmed the testimonies of DW1, DW2 and DExhibits 1 to 12 in this suit.
18. In the defendants' submissions dated May 13, 2022 and filed in court on May 20, 2022, four issues for determination including whether PW1 has proved his adverse possession claim beyond any reasonable doubt. It was the submission of the defendants' counsel that PW1 has not proved the claim as required by the law thus, urged the court to dismiss this suit with costs.
19. To fortify the submissions, counsel cited sections 7, 37 and 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya. Counsel further relied on *Wambugu v Njuguna* [1983] KLR 172, *M'Mbaoni M'Ithara v James Mbaka* [2019] eKLR, *Wanje v Saikwa* [1984] eKLR and *Evans Odhiambo Kidero and 4 others v Ferdinand Ndungu Waititu and 4 others* [2014] eKLR, among other authorities.

D. Issues For Determination

20. It is important to note that Order 15 of the *Civil Procedure Rules, 2010* provides for framing of issues and materials from which issues may be framed in a suit.
21. Generally, the issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see *Great Lakes Transport Company (U) Ltd v Kenya Revenue Authority* [2009] KLR 720.
22. In that regard, the issues for determination herein boil down to whether the plaintiff;
 - a. has proved the dictates of adverse possession over the 1st, 2nd, 3rd and 4th suit parcels of land against the defendants, and
 - b. Is entitled to the orders set out on the face of the originating summons.
23. To clear any doubt, the dictates of adverse possession are well settled; see *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another* [2015] eKLR, among other authoritative pronouncements.

E Analysis And Determination

24. The first dictate is whether the registration of the 1st, 2nd, 3rd and 4th suit parcels of land is in the name of the person (s) other than the applicant or plaintiff herein. I take into account the terms "Proprietor" and "register" as given meaning in section 2 of the *Land Registration Act, 2016 (2012)*.
25. It is must be noted that he original land was registered in the name of the 1st 2nd and 3rd defendants' as at October 23, 2012 as per search (PEXhibit 4) and DEXhibit 6, register (PEXhibit 6). The title thereto was closed on partition into, *inter alia*, land reference number Suna West/Wasweta II/3103 measuring approximately eight decimal eight hectares (8.8 Ha) in area.
26. Further, it is noted that on December 17, 2012, the 1st suit parcel of land got registered in the name of the 3rd defendant. The title thereto was issued to her on July 12, 2013 as per PEXhibits 7 and 13 and DEXhibit 2.
27. It is further noted that the 2nd suit parcel of land was registered in the name of 2nd defendant as at December 17, 2012 and title deed issued to her on April 10, 2013. The same is revealed in PEXhibit 9 and DEXhibit 1.
28. Furthermore, LR No Suna West/Wasweta II/3103, is a partition of original land as disclosed in PEXhibits 12 and 14 and registered in the name of 1st defendant. On May 28, 2013, the same was



subdivided to the 3rd and 4th suit parcels of land. Both are registered in the name of the 1st defendant as shown by PExhibits 10 and 11 and DExhibits 3, 5 and 6.

29. In re-examination, DW1 was emphatic that the 3rd suit parcel of land is registered in his name. In light of the foregoing, the 1st, 2nd, 3rd and 4th suit parcels of land are registered in the names of the defendants and not in the name of PW1 hence, the first dictate is resolved accordingly.
30. As regards the second dictate namely that the plaintiff must be in open and exclusive possession of the 1st 2nd 3rd and 4th parcels of land in question in an adverse manner to the title of the owner, the defendants asserted that the plaintiff's occupation thereon was with their consent. During cross examination by the defendants' counsel, PW1 stated that he didn't live on the said parcels of land with the consent of the defendants. That he lived thereon peacefully for years.
31. In re-examination, PW1 concisely and with precision stated thus;
- “I have lived on the original land since 1968.”
32. PW2, PW3 and PW4 affirmed the evidence of PW1 that the latter lives on the 1st 2nd 3rd and 4th suit parcels of land. Their testimonies were further affirmed by the evidence of DW1, DW2 and DW3. During cross examination, DW2 was stated that;
- “I got married and found PW1 in occupation and possession of part of the suit parcels of land.....I got married in 1985.....”
33. The statement of DW1 as per paragraphs 13 and 15 hereinabove is borne in mind. Further, in cross examination, DW1 was succinct that;
- “I know PW1.....He was born and live on the suit parcels of land in their original form. He has been occupying and cultivating the original land before it's sub division for over 12 years. I am 35 years old.....”
34. Moreover, DW3 stated in cross examination that she found PW1 living on the original land before it's sub division. That he occupied a portion of the land and that he has his home thereon.
35. It is noteworthy that the Migori County Surveyor's report dated September 18, 2019 was filed in court on October 25, 2019 further to this court's orders of April 2, 2019. The executive summary of the report reads in part;
- “Though parcel number 4570 is registered in the name of Samwel Baraza Jandiko, the actual occupant on the ground is Jason Wasonga Sangra.”
36. Clearly, the report concluded that the boundaries of the 1st 2nd 3rd and 4th parcels of land were fixed on the ground. It recommended that the parties to maintain and respect the boundaries as re-established pending further orders from the court. The report was adopted by the court on March 17, 2021 after Mr Adawo counsel for the defendant informed the court that he had no issue with it. That there was no need to call it's maker and urged the court to adopt the same.
37. Indeed, the surveyor's report is opinion evidence and sections 48 to 54 of the *Evidence Act* Chapter 80 Laws of Kenya make provision for evidence from expert witnesses. The report affirms the position of PW1 that he is in possession of the 4th suit parcel of land.



38. On the facts of this case and the circumstances, I accept and adopt the said report bearing in mind the decision in *Amosam Builders Developers Ltd v Gachie and 2 others* (2009) KLR 628 and my decision in *Registered Trustees Legio Maria Africa Church Mission v Simeon Nyamweya Obwocha* [2018] eKLR, among other authorities.
39. It is established law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* [2017] eKLR.
40. On the 3rd dictate, adverse possession is attained once the owner of the land in question ceases to possess, use and enjoy the same; see *Halsbury's Laws of England* 4th Edition Volume 28 and *Wanje and Benson Wachira cases* (supra).
41. Evidently, the plaintiff is in open and exclusive possession of the 4th suit parcel of land for a period in excess of twelve years. Therefore, the 1st defendant who is registered as the proprietor of the same has been dispossessed thereby in view of sections 25 (b) and 28 (h) of the *Land Registration Act, 2016 [2012]*.
42. The burden of proof in civil cases is always on the plaintiff and the standard of proof is on a balance of probabilities as held in *Ahmed Adulkarim v Member for Lands and Mines* [1958] EA 436 at 441, *Kazungu Katana case* (supra) and other authoritative pronouncements.
43. On the whole, the suit succeeds in part. The plaintiff has proved on a balance of probabilities, that he has acquired title in respect of the 4th suit parcel of land only by way of adverse possession. Thus, he is partially entitled to orders 1, 2, 3 and 4 as stated on the face of the originating summons.
44. The plaintiff has failed to prove his claim over the 2nd, 3rd and 4th suit parcels of land against the defendant to the requisite standards. Therefore, the claim thereof must fail.
45. Wherefore, this court hereby renders the following final orders;
- a) The plaintiff's claim against the defendants in respect of the 1st 2nd and 3rd suit parcels of land is hereby dismissed.
 - b) Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for orders 1, 2, 3 and 4 sought in the originating summons in respect of the 4th suit parcel of land only and as stated in paragraphs 7 and 43 hereinabove.
 - c) By dint of the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the nature and the circumstances of the case as well as bearing in mind *Halsbury's Laws of England* 4th Edition (supra) and *Evans Kidero case* (supra), the defendants to bear two thirds (2/3) of the costs of this suit.
46. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 8TH DAY OF DECEMBER 2022.

G .M. A ONG'ONDO

JUDGE

PRESENT

1. Ms Amondi instructed by Mr D. Adawo, learned counsel for the defendants

2. 1st defendant

3. Okello, court Assistant

