



Mbuya alias Raphael Odhiambo Oundo v Mwaro & 2 others (Environment and Land Case E008 of 2023) [2025] KEELC 4944 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 4944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E008 OF 2023**

AE DENA, J

JULY 3, 2025

BETWEEN

**RAPHAEL ODHIAMBO MBUYA ALIAS RAPHAEL ODHIAMBO
OUNDO PLAINTIFF**

AND

CHARLES OOKO MWARO 1ST DEFENDANT

BENARD OCHIENG MWARO ALIAS OCHIENG MWARO 2ND DEFENDANT

JESEPH ODHIAMBO OLOO ALIAS OKOTH OLOO 3RD DEFENDANT

JUDGMENT

1. On 22/04/2021, the plaintiff in this matter obtained judgment against the defendants in Kisumu ELC 58 of 2018 (OS) where the court held, he had acquired a portion of 1.4 Ha of land parcel no. LR North Ugenya/Ndenga/271 ('suit parcel') by adverse possession. The court also issued orders of permanent injunction restraining the defendants and or their agents from interfering with this 1.4 Ha of the suit property.
2. The plaintiff herein who was the plaintiff in the previous suit executed the judgment against the defendants who are also the defendants herein.
3. The suit property was subdivided into two portions to create North Ugenya/Ndenga/1780 and North Ugenya/Ndenga/271 ('defendants' portion'). A portion of the suit property was ceded to create a public road.
4. The plaintiff further subdivided the North Ugenya/Ndenga/1780 to create North Ugenya/Ndenga/1798 and 1799. However, the defendants allegedly defied the court orders and descended on the subdivisions.



5. Upon institution of contempt proceedings in Kisumu ELC 58 of 2018 (OS), Okong'o J, on 1/02/2023 released the 1st defendant on his personal undertaking he would comply with the judgment of the court.
6. The court further ordered that in the event of disobedience by way of entering or trespassing on the defined portion, the officer commanding Ukwala Police Station (OCS) should carry out an arrest and bring the 1st defendant for sentencing for being in contempt.
7. It appears the 1st defendant did not comply with his personal undertaking hence the institution of these proceedings.
8. Vide a ruling dated 20th June 2023 these proceedings were stayed under Section 6 of the [Civil Procedure Act](#) pending conclusion of contempt proceedings in Kisumu ELC 58 of 2018 (OS).
9. On 22/11/2022 Mr Odera counsel for the plaintiff informed the court the contempt proceedings were concluded where the 1st defendant was arrested. That however they had not vacated the suit property nor the subdivisions. The court issued directions for service upon the defendants and they never entered appearance.
10. The matter proceeded for formal proof on 25/02/2025. The plaintiff was in open court and Mr. Odera proceeded virtually from Busia.

Plaintiff evidence

11. The plaintiff testified on his behalf and adopted the witness statement dated 13/03/2023 as his evidence in chief. The witness statement basically reiterated the background already herein. The witness added that pursuant to the contempt proceedings in Kisumu the defendants were arrested. The 1st defendant was jailed for 6 months but returned to the suit property in defiance to the courts warning that they should not return thereon.
12. Upon inquiry by the court whether the defendants were still in occupation of plots North Ugenya/ Ndenga/1798 and 1799 his answer was in the affirmative.
13. The witness also produced the documents in the plaintiff list of documents dated 13/3/2023 and 24/4/2023 Pex 1- 11.
14. With the above the plaintiff's case was marked as closed.

Submissions

15. No submissions were on record despite orders issued on 22/02/2025 and 19/3/2025.

Analysis and Determination

16. I have considered the plaint and the evidence adduced before court. The main issue for determination is whether the orders sought should issue.
17. The plaintiff's case is that he is the registered proprietor of the suit properties plots North Ugenya/ Ndenga/1798 and 1799 which the defendants have entered and are undertaking activities. That they have refused to vacate the part of the suit property they currently continue to cultivate and despite his pleas to them to peacefully vacate they have continued to threaten him with violence. All this is after successful proceedings he commenced in Kisumu ELC Case No. 58 of 2018 which was determined in his favor. He now wants an eviction order to be issued for the defendants to be forcefully removed from the part of the suit property they occupy.



18. The suit is undefended. However notwithstanding that the suit is undefended, the Plaintiff is required to formally prove its case on a balance of probabilities as required by the law. This position was affirmed by the Court of Appeal in *Kirugi and Another v Kabiya & 3 others* (1987) KLR 347 [1983] eKLR where it was held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard. The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended. The burden of proof is in no way lessened because the case is heard by way of formal proof”.
19. This matter is simple. The plaintiff claim arises from proceedings that were heard and concluded in Kisumu ELC Case No. 58 of 2018 pitting the plaintiff Raphael Odhiambo Mbuya against the defendants in this matter. All that the plaintiff was required to produce is proof of the said proceedings, their outcome including evidence of his registration pursuant to the orders of the court. He is also to prove the occupation of the defendants therein.
20. The plaintiff produced an Order issued at Kisumu on 21st May 2021 pursuant to judgement delivered by Justice Ombwayo on 22nd April 2021. Order a) is to the effect that the respondents (who are the defendants in the present proceedings) rights over 1.4 ha out of North Ugenya/Ndega/271 measuring (2.2 Ha) as possessed by the Applicant (who is the plaintiff herein is extinguished by adverse possession from the time the applicant acquired the same. Order b) thereof granted right of title to the 1.4HA of the portion North Ugenya/Ndega/271.
21. Additionally, an order by S. Okongo J dated 22/11/2022 was produced directing the OCS Ukwala Police Station to assist the plaintiff herein in enforcement of the orders of the court to ensure that Charles Ooko Mwaro and Okoth Oloo are prevented from entering the subdivision of North Ugenya/Ndenga/271.
22. The next set of proof should be documents that evidence the excision of the 1.4 Ha from Ugenya/Ndega/271 into the plaintiffs name.
23. The plaintiff produced as part of his evidence in court Copy of green card opened on 20/7/73 for parcel North North Ugenya/Ndenga/271 registered in the name of Patris Mwaro Okol on 25/02/83, Green Card opened on 8/11/21 for parcel 1780 partition of Plot No. 271 registered in the name of Rafael Odhiambo Oundo the plaintiff herein. This green card shows that the title was closed on subdivision into two titles 1778 and 1779. Also produced were the corresponding official searches dated 7/3/2023 showing Rafael Odhiambo Oundo as the registered proprietor. All these documents confirm the plaintiff was subsequently registered as proprietor post the judgement of the court.
24. The plaintiff was then to prove the occupation of the defendants on the above properties. The plaintiff told the court that the defendants have returned to the land after the contempt proceedings in Kisumu Court. The court inquired further of the plaintiff the nature of the occupation and he clarified that the 1st defendant was the 1st to return to the property. That thereafter the 3rd defendant followed and they have both planted cassava. Benard the 2nd defendant had only cleared an area thereof. This evidence was not controverted by the defendants.
25. It is the finding of this court that the plaintiff has proved his claim against the defendants to warrant the grant of the orders sought.



26. This court therefore enters judgement for the plaintiff against the defendants in the following terms; -
1. That the Defendants, their families, workers and or anyone working on the suit land on their behalf shall be permanently evicted from the suit land namely LR North Ugenya/Ndega/1798 and 1799.
 2. That further to order 1 above the Defendants shall voluntarily vacate the portion of suit property registered in the plaintiffs name within 45 days of this judgement and failure to which the plaintiff shall proceed to execute this judgement.
 3. That the OCS Ukwala Police Station to assist the plaintiff herein in enforcement of the orders of the court by providing security.
 4. There shall be no orders as to costs.

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF JULY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

3/07/2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Odera for the Plaintiffs

No appearance for the Defendants

Court Assistant: Ishmael Orwa

