



Akuku ((Suing as the Personal Representatives of Valentine Akuku Simba-Deceased)) v Ochieng (Enviromental and Land Originating Summons 53 of 2021) [2024] KEELC 570 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEELC 570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 53 OF 2021**

**GMA ONGONDO, J
FEBRUARY 7, 2024**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT,
CHAPTER 22 LAWS OF KENYA**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

**IN THE MATTER OF A CLAIM FOR PRESCRIPTION BY ADVERSE
POSSESSION UNDER SECTION 38 OF THE LIMITATION OF ACTIONS
ACT.**

BY

BETWEEN

**SUSILIA AKOTH AKUKU PLAINTIFF
(SUING AS THE PERSONAL REPRESENTATIVES OF VALENTINE AKUKU
SIMBA-DECEASED)**

AND

LAMECH OCHIENG DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit revolves around land title number East Kasipul/Kojwach/Kamioro/2092 measuring approximately Two Decimal Two Zero Hectares (2.20 Ha) in area, the suit land herein. It is a sub



- division of the parent land title number West Kasipul/Kojwach/Kamioro/926 and located within Homa Bay County.
2. On 19th July 2016, the court directed that the originating summons dated 7th August 2014 lodged on even date and the replying affidavit sworn on 18th December 2015 filed on even date, be treated as the plaint and the statement of defence herein respectively. That this suit be heard by viva voce evidence.
 3. The plaintiff is represented by the firm of Bana and Company Advocates.
 4. The defendant is represented by the firm of Oguttu Mboya, Ochwal and Partners Advocates

B. The Plaintiff's Case

5. The plaintiff commenced this suit by way of the originating summons pursuant to, inter alia, Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules, 2010 and section 38 of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya for;
 - a. A declaration that as at 8th March 2013 when the defendant was registered as proprietor of the suit land, the plaintiff had already acquired the right to title thereto by way of adverse possession.
 - b. That on account of 1 above, the transfer of the suit land to the Defendant on 8th March, 2013 was null and void and of no effect.
 - c. An order that registration of the defendant as holder of the suit land on 8th March, 2013, be cancelled and the plaintiff be registered as proprietor thereof.
 - d. An order restraining the defendant or anybody acting for or under him from interfering with the plaintiffs' occupation of the suit land.
 - e. Costs.
6. In summary, the plaintiff's lamentation is that she is the widow and personal representative of Valentine Akuku Simba (Deceased-1) who died on 22nd September 2010 as per grant issued on 12th June 2013 in Oyugis SPM's Court Succession Cause No. 102 of 2013 (PExhibit 1). That in the year 1996, Deceased-1 bought the suit land being a portion of the parent land from the defendant's father, Paskal Onditi Ongonga (Deceased-2) who died in the year 1997 without transferring it to deceased-1. That immediately after the sale of the suit land, the plaintiff and Deceased-1 took possession of it and erected a building thereon. That the plaintiff has occupied the suit land openly and notoriously for uninterrupted period in excess of 12 years in an adverse manner to the defendant's rights thereto. That the defendant has subdivided the parent land and registered the suit land in his name.
7. The plaintiff (PW1) testified that deceased-1 bought the suit land from deceased-2 who died in 1997. That after Deceased-1 passed away in 2004, she obtained PExhibit 1 and that she has cultivated the suit land since 1967 to date. That the defendant caused sub division of the parent land which he registered in his name as per certificate of official search dated 24th April 2024 (PExhibit 2)
8. PW2, Chrisphine Mbata Arara, a church minister told the court that deceased-1 started cultivating the suit land immediately he bought it from Deceased 2 in 1966. That full cultivation stated in 1967. That the defendant subdivided the parent land to give forth the suit land.
9. PW3, Owuor Abiero, testified that the suit land is four acres in area and it was a portion of the parent land. That it is registered in the name of the defendant. That PW1, wife of deceased 1, has cultivated it since 1967 to-date. That orphans who are grandchildren of PW1, live thereon in a house that was built 15 years ago.



10. By the submissions dated 6th December 2023, learned counsel for the plaintiff referred to the parties' respective pleadings and testimonies and that the plaintiff has established adverse possession and her evidence is not controverted by the defendant who did not call any witnesses. Counsel submitted that the plaintiff has proved her claim on a balance of probabilities. That therefore, judgment be entered for her against the defendant as prayed.

C. The Defendant's Case

11. In a replying affidavit of twenty paragraphs sworn on 18th December 2015, the defendant opposed the originating summons. He averred, inter alia, that the plaintiff has not satisfied the essential ingredients to warrant adverse possession over the suit land. He urged the court to dismiss this suit with costs.
12. Further, the defendant deposed, that neither the plaintiff nor Deceased-1 entered upon the suit land of the parent land and has resided or built a structure thereon. That upon completion of succession proceedings in the name of Deceased-2, the suit land was registered in his name. That the plaintiff has not produced any evidence to prove sale of the suit land to deceased-1 by deceased-2.
13. The defendant (DW1) relied on his statement dated 18th December 2015 and his list of documents of even date serial numbers 1 to 6 (PExhibits 1 to 6 respectively) as part of his evidence in chief. He stated, inter alia, that PW1 does not live, occupy or built on the suit land. That she has not produced evidence in support of her assertion and that PW2 and PW3 are her in laws who adduced false evidence. That PW1 did not call an independent witness herein and implored the court to dismiss this suit with costs.

D. Points for Determination

14. Order 15 of Civil Procedure Rules, 2010 provides for framing of issues and materials from which issues may be framed in a suit. Furthermore, it is well settled that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720*.
15. In the foregone, it is the considered view of this court that the issues for determination in this suit crystallize to whether the plaintiff's claim has satisfied the doctrine of adverse possession as captured in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another (2015) eKLR* where the Court of Appeal cited sections 7 and 13 (1) of the *Limitation of Actions Act* Chapter 22 Laws of Kenya and set out the doctrine's ingredients as follows;
 - a. The suit land must be registered in the name of a person other than the applicant,
 - b. The applicant must in open and exclusive possession of that suit land in an adverse manner to the title of the owner and
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuation of possession by the owner.

E. Discussion and Determination

16. It is not in dispute that the suit land is registered in the name of the defendant herein. Indeed, the registration was done on 8th March 2013 and title deed issued on 26th March 2013 accordingly as revealed in PExhibit 2
17. The said registration was made pursuant to sections 24, 25 and 26 and 30 of the *Land Registration Act, 2016 (2012)*. Be that as it may, the defendant's proprietorship thereof can be limited under section 26 of the same Act.



18. Moreover, the plaintiff's assertion that she has acquired ownership of the suit land by way of adverse possession, may restrict the defendant's rights and interests thereon. The concept of adverse possession is one of the overriding interests under section 28 (h) of the Land Registration Act, 2016 (2012) and as held in *Salim-vs-Boyd* (1971) EA 550.
19. PW1 claims ownership the whole land of the suit land which was surveyed at four acres in area. It is therefore, a definite portion of land as observed in the case of *Gatimu Kinguru-vs-Muya Gathangi* (1976-80) 1 KLR 317.
20. It was the testimony of PW1 that she started cultivating the suit land in 1967. That there is a house of her late daughter in law erected on it.
21. Under examination in chief, PW1 stated thus;

“.....I have planted sweet potatoes on the land. I have ploughed the land.....”
22. The evidence of PW1 was reinforced by PW2 who stated in cross examination that PW1 cultivates the suit land to-date. Another witness, (PW3) told the court that PW1 cultivates it and that her (PW1) orphaned grand children live thereon.
23. The court observes that PW2 stated in cross examination that the defendant subdivided the parent land into, inter alia, the suit land. In cross examination, DW1 admitted the said subdivision.
24. It must be noted that mere change of ownership through subdivision, transfer and registration does not defeat adverse possession; see *Githu-vs-Ndete* (1984) KLR 776.
25. It is established law that possession can take different forms such as fencing or cultivation of the land in dispute; see *Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR and *Elijah. O.L Opar-vs-Tobias Odhiambo Abach* (2019) eKLR.
26. Evidently, the suit land is registered in the name of DW1. The plaintiff and her family members including her grandchildren, have been in continuous and peaceful possession and occupation of it in excess of 12 years.
27. In that scenario, the defendant has been dispossessed thereby; See *Kinguru and Githu* cases (supra).
28. On the basis of the plaintiff's adverse possession claim over the suit land and transfer of the suit land in the name of the defendant which is null and void, the plaintiff is entitled to orders including cancellation of the title of the suit land in the name of the defendant and preservation relief in form of a permanent injunction; see *Nguruman Ltd -vs- Jan Bonde Nielsen and 2 others* 2014 and section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011).
29. It is thus, the finding of this court that the plaintiff has proved that she has acquired title over the suit land by way of adverse possession on a balance of probability. In the circumstances, the defendant's case fails to displace her claim.
30. Accordingly, judgment is hereby entered for the plaintiff against the defendant for orders 1,2,3,4 and 5 sought in the originating summons dated 7th August 2014 as stated at paragraph 5(a) (b) (c) (d) and (e) hereinabove. For clarity, the restraint order granted further to prayer number 4 of the Originating summons, is a permanent injunction.
31. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 7TH FEBRUARY 2024



G. M. A ONGONDO

JUDGE

PRESENT

- a. Mr J Bana learned counsel for the plaintiff
- b. Terence Luanga, court assistant

