



**Mwita & another (Suing as Administrators of the Estate of Mwita Kerario - Deceased) v Nyamohanga & another (Sued as Administrators of the Estate of Nyamohanga Kerario - Deceased) (Environmental and Land Originating Summons 66 of 2021) [2024] KEELC 554 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 554 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 66 OF 2021**

**GMA ONGONDO, J  
FEBRUARY 6, 2024**

**BETWEEN**

**ANTHONY BOKE MWITA ..... 1<sup>ST</sup> PLAINTIFF  
SIMON MOSAMA ..... 2<sup>ND</sup> PLAINTIFF  
SUIING AS ADMINISTRATORS OF THE ESTATE OF MWITA KERARIO -  
DECEASED**

**AND**

**EUNICE ROBI NYAMOHANGA ..... 1<sup>ST</sup> DEFENDANT  
MARY MOGESI NYAMOHANGA ..... 2<sup>ND</sup> DEFENDANT  
SUED AS ADMINISTRATORS OF THE ESTATE OF NYAMOHANGA  
KERARIO - DECEASED**

**JUDGMENT**

**A. Introduction**

1. The instant suit concerns a portion of land reference number Nyabasi Bomerani/4 measuring approximately two decimal nine hectares (2.95 Ha) in area (The suit land herein). The same is contained in Registry Map Sheet Number 49 to 53 and located within Migori County.
2. The plaintiffs are represented by Kerario Marwa and Company Advocates.
3. The defendants are represented by M/s Abisai and Company Advocates.



4. Initially, this matter was filed at Migori Environment and Land Court before being transferred to this court on 24<sup>th</sup> November 2021 for determination, since it had been substantially heard by this court see Articles 50(1) and 48 of *the Constitution* of Kenya, 2010.

## **B. Summary of the Parties' Respective Cases**

5. The plaintiffs instituted the suit by way of an originating summons dated 26<sup>th</sup> July 2018 and filed herein on even date pursuant to Order 37 Rule 7 of the Civil Procedure Rules, 2010 and Section 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, seeking determination of the issues infra:
  - a. Has the family of Mwita Kerario deceased occupied all the portion of land measuring 2.95(Ha) being part of the half share of the suit land registered in the name of deceased Nyamohanga Kerario for over 12 years?
  - b. Has the said occupation been open, consistent, and known to the family of deceased Nyamohanga Kerario?
  - c. Has the title of Nyamohanga Kerario or his heirs to the said 2.95 (Ha) been extinguished by effluxion of time?
  - d. Is the family of Mwita Kerario entitled to registration of the 2.95 (Ha) as part of the estate of Mwita Kerario by Adverse Possession?
6. The originating summons is founded upon a sixteen (16) paragraphed supporting affidavit of the 1<sup>st</sup> plaintiff sworn on even date and annexed thereto together with a copy of the grant of letters of administration to the estate of Mwita Kerario (deceased 1), a copy of the grant of letters of administration to the estate of Nyamohanga Kerario (deceased 2), a copy of green card relating to the suit land and a copy of the Surveyor's Report (ABM 1 to 4 respectively).
7. Briefly, the plaintiffs' contention is that their late father, deceased 1, was an elder brother to deceased 2. That both deceased 1 and 2 lived on the suit land which measures 19.5 Ha in area. That although the land register indicates that each of the two deceased brothers owned ½ share of the suit land, the deceased brothers divided the suit land into two unequal portions. That deceased 1 occupies 12.20 Ha whereas deceased 2 occupies 7.3 Ha thereof. That the said occupation has been open and consistent for a period exceeding 40 years with the knowledge of deceased 2. That therefore, the family of deceased 1 has acquired the disputed portion by way of adverse possession.
8. In his testimony, the 1<sup>st</sup> plaintiff Anthony Boke Mwita (PW1), relied on his supporting affidavit sworn on 26<sup>th</sup> July 2018 and a grant of letters of administration intestate filed on 21<sup>st</sup> September 2017, a certificate of confirmation of grant dated 11<sup>th</sup> February 2016, a copy of register in respect to the suit land (PExhibits 1 to 3 respectively), as well as a survey report filed herein on 26<sup>th</sup> July 2018 (PMFI4) and a copy of the minutes of the meeting held on 30<sup>th</sup> November 2019 (PExhibit 5). He reiterated the contents of the aforesaid supporting affidavit, stating that deceased 1 and 2 fixed boundaries between their respective shares of the suit land in 1979.
9. Moreover, PW1 testified that at the meeting that was held on 30<sup>th</sup> November 2019 to try and settle the dispute, it was resolved that the parties maintain the boundaries on the suit land as established by deceased 1 and 2. That the said meeting was attended by a total of 56 people, including the 2<sup>nd</sup> defendant herein. That however, the 1<sup>st</sup> defendant failed to attend the same.
10. In cross-examination, PW1 admitted that the defendants did not attend the survey exercise conducted by PW2. It resulted into PExhibit 4.



11. PW2, Joseph Kigisuguta Chacha, a surveyor, testified that he visited the suit land at the request of the plaintiffs. That he noted that the plaintiffs occupy 12.2 Ha thereof. That there were clear old boundaries which could be over 12 years old. He produced his report filed on 26<sup>th</sup> July 2018 as PExhibit 4.
12. During cross-examination, PW2 confirmed that the 1<sup>st</sup> defendant did not attend the survey exercise. That PExhibit 4 bears no date and does not disclose the procedure adopted in carrying out the survey nor the equipment used. PW2, however, averred that PExhibit 4 is not biased and was prepared on the basis of what is on the ground.
13. The defendants opposed the suit vide a replying affidavit sworn on 18<sup>th</sup> February 2019 by the 1<sup>st</sup> defendant herein and documents annexed thereto and marked ERN 1 to 5 to wit: a copy of grant of letters of administration to the estate of deceased 2, a copy of the official search certificate in respect to the suit land, a copy of consent of the Land Control Board to subdivide the suit land, a copy of court order stopping subdivision of the suit land and list of purchasers of the disputed portion of the suit land. She averred that the plaintiffs and defendants are each entitled to a half share of the suit land. That there has been an ongoing dispute between the parties, due to the plaintiffs' encroachment onto the portion of land belonging to the defendants.
14. DW1, Eunice Robi Nyamohanga, relied on the her Replying Affidavit sworn on 18<sup>th</sup> February 2019 which was adopted as part of her evidence in chief and documents marked as ERN 1 to 5 annexed thereto (DExhibits 1 to 5). She testified that her late husband, deceased 2, and deceased 1 had agreed to subdivide the suit land equally but they died before doing so.
15. On cross-examination, she averred that no surveyor had visited the suit land. That there were no boundaries thereof. That therefore, the surveyor should establish the same in regard to the estates of deceased 1 and deceased 2.
16. Having determined that the same was a boundary dispute, on 27<sup>th</sup> July 2020 the court ordered and directed the Land Registrar Kuria East and Kuria West Sub Counties together with the Surveyor, to visit the suit land with a view to establish and fix boundaries thereon and any subdivisions therefrom after ascertaining the original boundaries and the subsequent ones, if any, and file reports thereof pursuant to Sections 18 and 19 of the [Land Registration Act, 2016 \(2012\)](#).
17. The Land Surveyor, James Okoth Atata, testified on 19<sup>th</sup> July 2022 as PW3 herein. He stated, inter alia, and confirmed preparing a report dated 17<sup>th</sup> February 2021 and a sketch map. PW3 stated that both the plaintiffs and defendants were present during the exercise. That the Land Registrar took proceedings of the exercise and thereafter, a report and sketch (PExhibits 5a and b) were generated and duly executed by him.
18. During cross-examination by Counsel Kerario Marwa, PW3 stated that that the plaintiff's portion of the suit land measures 12.1 Ha in area. That defendants' portion thereof measures 7.4 Ha in area.
19. DW2, Dancan Kerario Nyamohanga, a son to deceased 2 and DW1 and step-son to DW2, relied on his statement dated 22<sup>nd</sup> July 2022 which was adopted as part of his evidence. He contended that PExhibit 5a is different from what is on the ground.
20. On cross-examination, he stated that the suit land was not partitioned by deceased 1 and 2. That no boundary exists thereon. That he did not attend the meeting held on 30<sup>th</sup> October 2019 whose aim was to resolve the dispute out of court. That all the parties to the suit have lived on the suit land even before the 1970s. That the plaintiffs were born and bred thereon.



21. Thereafter, the plaintiff's counsel filed submissions dated 6<sup>th</sup> October 2023 and identified three issues for determination, to wit, whether the plaintiffs have proved that they have stayed on part of the suit land belonging to deceased 2 measuring approximately 2.35 Ha for over 12 years; whether the plaintiffs are entitled to the orders sought in the originating summons and who pays the costs of the suit?
22. Counsel submitted that from the evidence on record, the plaintiffs have proved that they have been occupying a portion of the suit land measuring 2.35 Ha from the half share that should belong to the defendants openly and uninterruptedly. That therefore, the plaintiffs have acquired the disputed portion by way of adverse possession. To buttress the submissions, reliance was placed on various authorities including the case of James Maina Kinya -vs- Gerald Kwendaka a.k.a Gerald Michael Kwendeka (2018) eKLR.
23. Learned counsel for the defendants filed submissions dated 26<sup>th</sup> October 2023 and identified twin issues for determination thus: whether the plaintiffs are entitled to the orders sought and what orders should issue?
24. Counsel submitted that the plaintiffs cannot lay claim of adverse possession since they are beneficiaries of the estates of the deceased persons. He relied on the case of Mbira -vs- Gachuhi (2002) IEALR 137, emphasizing that the plaintiffs' occupation of the said portion was as a result of kinship or relations. That as kin, there is implied consensual occupation thus adverse possession does not arise. Therefore, counsel urged the court to dismiss the instant suit with costs to the defendants.

### **C. Issues for Determination**

25. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd-vs-Falcon Grounds Ltd* (2000) 2 EA 385 and Order 15 of the Civil Procedure Rules, 2010.
26. I have duly considered the originating summons, replying affidavit, the testimonies of PW1, PW2 and PW3 and the plaintiffs' submissions as well as the testimonies of DW1 and DW2 and the defendants' submissions. So, the following issues fall for determination:
  - a. Whether the plaintiffs have proved their case to the requisite standard?
  - b. Who should bear the costs of this suit?

### **D. Discussion and Determination**

27. In the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another* (2015) eKLR, the Court of Appeal stated that adverse possession dictates thus;
  - a. The parcel of land must be registered in the name of a person other than the applicant,
  - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
  - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
28. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -vs- Ben Muniyitwa Songoi* (2020) eKLR.
29. It must be noted that the plaintiffs' claim is for a portion of land reference number Nyabasi Bomerani/4 measuring approximately two decimal nine hectares (2.95 Ha) in area, the suit land herein. Therefore,



the plaintiffs' claim is over a definite portion of land as held in *Muthuita –vs- Wanoe & 2 others* (2008) 1KLR (G&F) 1024.

30. In the first instance, the suit land is registered in the names of the plaintiffs and the defendants herein, as administrators of the estates of deceased 1 and deceased 2 respectively. They hold the same in equal shares. This is evidenced by a copy of the green card relating to the suit land (PEXhibit 3) and certificate of official search dated 7<sup>th</sup> August 2018 (DEXhibit 2). The plaintiffs herein are claiming a portion of the suit land measuring 2.95(Ha) being part of the half share of the suit land registered in the name of defendants herein.
31. The plaintiffs averred that although the land register indicates that each of the two deceased brothers owned ½ share of the suit land, the deceased brothers divided the suit land into two unequal portions. That deceased 1 occupies 12.20 Ha whereas deceased 2 occupies 7.3 Ha thereof.
32. This court subscribes to the decision of the Court of Appeal in *Richard Wefwafwa Songoi* case (supra) wherein it was stated that:
  - “ 30. The law and requirements for adverse possession was reiterated in the case of *Mbira –v- Gachuhi*, (2002) IEALR 137 where it was held that: “..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....” (Emphasis laid)
33. Clearly, the possession of the disputed portion by the plaintiffs herein has neither been non-permissive nor non-consensual. Deceased 1 and 2 agreed to establish boundaries on the suit land as evidenced by PEXhibit 4 and PEXhibits 5a and b.
34. In the case of *Parklands Properties Ltd -vs-Patel* (1981) KLR 52, the court held that:
  - “ ...the issue whether a party’s possession of a piece of land is adverse is a matter of evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully established the particulars of adverse possession pleaded...”
35. In that regard, I find that the plaintiffs have failed to prove their claim for adverse possession.
36. In *Odd Jobs –vs- Mubia* [1970] EA 476 the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision; see also *Vyas Industries –vs- Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
37. From the evidence on record, the plaintiffs occupy approximately 12.10 Ha of the suit land whereas the defendants occupy 7.4 Ha thereof. This was corroborated by a copy of the minutes of the meeting held on 30<sup>th</sup> November 2019 (PEXhibit 5), Surveyor’s Report (PEXhibit 4) and Government Surveyor’s Report and sketch (PEXhibit 5a and b) which confirmed that deceased 1 and 2 affixed boundaries on the suit land.
38. PEXhibits 5a and b were prepared pursuant to an order of this court made on 27<sup>th</sup> July 2020 in accordance with Sections 18 and 19 of the [Land Registration Act](#), 2016 (2012).
39. It is important to note that surveyors’ reports are opinion evidence. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the [Evidence Act](#), Chapter 80 Laws of Kenya.



40. In Shah and another -vs- Shah and others [2003] 1 EA 290 Ombija, J. expressed himself in part:

“...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...”

41. In the present case, no expert evidence was availed by the defendants herein to controvert the findings of PW2 and PW3.

42. In the foregone, it is my considered view that the boundary dispute between the parties herein was determined as envisaged under Sections 18 and 19 (supra) and as stated in paragraphs 17 and 18 hereinabove.

43. Moreover, it is the finding of this court that issues (a) and (b) in the originating summons dated 26<sup>th</sup> July 2018 and filed herein on even date are proved while issues (c) and (d) contained therein are not proved to the requisite standard. So, the suit partially fails.

44. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise; See Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287.

45. This court has noted that the plaintiffs have partly succeeded and partly failed in their claim. Therefore, the court is of the opinion that the appropriate order to make on costs is that each party shall bear his or her own costs.

46. By the way, the court has observed that the parties belong to one family and they had attempted to resolve their matter as envisioned under Articles 60(1)(g) and 159 (2)(c) of *the Constitution* of Kenya, 2010. They are encouraged to further embrace the same with a view to resolving the dispute in finality.

47. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 6<sup>TH</sup> DAY OF FEBRUARY 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Ms. Aeleon Abisai instructed by R. Abisai, learned counsel for the defendants
2. 1<sup>st</sup> defendant
3. Luanga, Court Assistant

