



**Ogaye & 3 others v Olocho & 4 others (Environment & Land Case 20 of 2019) [2024] KEELC 5161 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 5161 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 20 OF 2019**

**MN KULLOW, J  
FEBRUARY 6, 2024**

**BETWEEN**

**GEORGE ONYANGO OGAYE ..... 1<sup>ST</sup> PLAINTIFF  
JARED ONGANG’A OPUNDO ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH ONGANG’A ONGUOR ..... 3<sup>RD</sup> PLAINTIFF  
CHARLES ODHIAMBO ONDORO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**JOSEPH OTIENO OLOCHO ..... 1<sup>ST</sup> DEFENDANT  
GEORGE ODHIAMBO ..... 2<sup>ND</sup> DEFENDANT  
COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT  
SUKARI NGURU INDUSTRIES ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein commenced this suit by way of an Originating Summons dated 27<sup>th</sup> February, 2019 against the Defendants seeking a determination of the following ISSUES: -
  - i. A declaration that the deceased or the Defendants right to recover the whole portion measuring 31.5Ha of L.R. No. SOUTH SAKWA/ KOGELO/320 is based under the Limitation of Actions Act Cap. 22 Laws of Kenya, and his title over the whole portion in occupation and/or use by the Plaintiffs thereto extinguished on the grounds that the Plaintiffs herein have openly, peacefully and continuously been in occupation and/or use and possession of the whole part of 31.5Ha for a period exceeding 12 years.



- ii. That there be an Order that the Plaintiffs be registered as the proprietors of the whole part measuring 31.5Ha of land parcel No. SOUTH SAKWA/ KOGELO/320 in the place of the Defendants and/or the Register thereof be rectified to reflect the Plaintiffs' ownership of the whole 31.5Ha under his name.
  - iii. That the Defendants herein be ordered to execute all the requisite papers necessary to have the Plaintiffs be registered as owners of the whole of L.R. No. SOUTH SAKWA/ KOGELO/320 measuring 31.5Ha decreed by the court, in default, the Deputy Registrar and/or court Executive Officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the court.
  - iv. That upon execution of the instruments of transfer, the 3<sup>rd</sup> Defendants do register the title in the names of the Plaintiffs herein.
  - v. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have leased the parcel to the 5<sup>th</sup> Defendant and have commenced cultivation and planting of sugarcane hence there be an injunctive order against the 5<sup>th</sup> Defendant from cultivating, erecting, selling the said parcel.
  - vi. Costs of the Originating Summons be borne by the 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> Defendants.
  - vii. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.
2. The Originating Summons is premised on 25 grounds thereon and on the 1<sup>st</sup> Plaintiff's Supporting Affidavit sworn on even date, on his own behalf and the Co- Plaintiffs. He avers that they donated portions of their parcel measuring in total 31.5Ha to the community (Lidwe, Kondoro and Kwop) to be used as grazing and watering points for the community's cattle.
  3. That they were however shocked when they conducted an official search to learn that the said portion of land donated to the community had been registered in the names of the Defendants and further that the same was subdivided into 2 portions; No. 1567 and 1568.
  4. It is their claim that the said registration of the suit land in the name of the 1<sup>st</sup> Defendant, the subsequent subdivision, transfer and registration thereof in the name of the 2<sup>nd</sup> Defendant was fraudulent and illegal and in total disregard of their interests. That as the original owners of the land thereof, they have absolute rights over the said parcel to the exclusion of the Defendants and other 3<sup>rd</sup> parties.
  5. They maintained that the suit land was donated by the Plaintiffs for community use and any irregular acquisition thereof is bad in law. He thus urged the court to allow the suit as prayed.
  6. The Defendants filed a Replying Affidavit sworn by the 1<sup>st</sup> Defendant on 23/07/2019, on his own behalf and on behalf of the Co- Defendants, in response to the allegations raised in the Originating Summons. It is his claim that the Plaintiffs have never resided on the suit land No. 320 since its registration on 26/9/1973. That his grandfather was the 1<sup>st</sup> registered owner of the suit land and upon his death, the same devolved to his father; Jerem Odhiambo Ogodo. Before the death of his father, he transferred the said land to him to hold in trust for the rest of the family.
  7. He confirmed subdividing the suit land into various portions and maintaining parts thereof for use by his family and all the beneficiaries of his late father. He maintained that the Plaintiffs have never resided on the suit land and urged the court to dismiss the suit against them with costs.



## **TRIAL**

8. The Originating Summons dated 27/02/2019 was canvassed by way of written submissions. The Plaintiff filed their submissions dated 8/10/2023 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submission dated 14/11/2023 which I have read and taken into consideration: -

### **Plaintiff's Submissions.**

9. The Plaintiff filed his submissions dated 8<sup>th</sup> October, 2023. I wish to point out that the said submissions were a repetition of the pleadings filed by the Plaintiffs; the Originating Summons and the Supporting affidavit.
10. Counsel for the Plaintiff further relied on the witness statements of his 7 witnesses and the documents in his list of documents dated 29/2/2019. He thereafter urged the court to grant the orders sought in the Originating Summons with costs.

### **Defendants' Submissions**

11. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed his submissions dated 14.11.2023 together with authorities. It was his submission that 2 issues arise for determination; whether the plaintiff is entitled to a declaration that they have acquired the suit land by way of adverse possession and whether the particulars of fraud raised against the Defendants are credible and warranted.
12. On the first issue it was counsel's submission that the Plaintiffs have not proved that they have been in exclusive possession of the suit land openly and as of right without interruption, for a period of over 12 years after dispossessing the owner or by discontinuation of possession by the owner on his own volition.
13. That the Plaintiffs have not provided any evidence before the court that they have been in occupation of the entire suit land measuring 31.5Ha or are in actual occupation of the land; it was his submission that adverse possession is a fact to be observed upon the land and not only seen in a title. It is his contention that from the pleadings, it is clear that the Defendants have been in actual and continuous occupation of the suit land since 1973 and are the ones residing on the suit land and cultivating it, that they have been planting sugarcane and have also leased a large part of the suit land to Sukari Industries, who have also been planting.
14. That the Plaintiffs have not established their claim on adverse possession to the required standard; in their Supporting Affidavit, they have only claimed that they have been grazing and watering their cattle on portions of the suit land but have not clearly stated the portion or acreage, they have failed to clearly state or identify the exact portion. That the Plaintiffs further contradicted themselves at paragraphs (L) and (S) of their Supporting Affidavit when they averred that the suit land had been previously used as a communal land before adjudication for grazing their cattle. He then posed that would the Plaintiffs want to be registered as owners of the community land as individuals? He submitted that the move to have the community land registered solely in their names as owners is fraudulent.
15. On the second it was their contention that the Plaintiffs pleaded particulars of fraud against the Defendants in the registration of the title to the Defendants; that the Defendant's grandfather acquired the same title fraudulently before adjudication. It was his submission that the suit land was registered to OGODO BULWA (1<sup>st</sup> Defendant's grandfather) as a 1<sup>st</sup> Registration after adjudication in the year 1973. That the land was thereafter transferred to the 1<sup>st</sup> Defendant's father via transmission, proper succession proceedings of the 1<sup>st</sup> Defendant grandfather's estate. The 1<sup>st</sup> Defendant's father, JEREM



ODHIAMBO OGODO, later transferred the suit land into the 1<sup>st</sup> Defendant's -name to hold in trust for his siblings.

16. He submitted that since the suit land was a 1<sup>st</sup> registration after adjudication, the *Land Adjudication Act* provides an elaborate process on how to solve disputes over land under adjudication. He maintained that the said mechanism had not been exhausted before the jurisdiction of the courts could be invoked. No evidence of an objection filed at the Land Adjudication Tribunal was shown by the Plaintiffs leading to the registration of OGODO BULWA in the year 1973.
17. It was further counsel's submission that this court lacked jurisdiction to entertain the matter since the Plaintiff failed to raise an objection to the Land Adjudication Tribunal, consequently, the court could not address issues of fraud arising from the adjudication process.
18. In conclusion, counsel maintained that the Plaintiffs have not given sufficient evidence to support their claim for adverse possession of the suit land and urged the court to dismiss the suit with costs.

### **Analysis and Determination**

19. I have reviewed the pleadings and parties' rival submissions in totality and it is my considered opinion that the following issues arise for determination: -
  - a. Whether the Plaintiffs have sufficiently proved their claim on Adverse Possession.
  - b. Whether the Plaintiffs are entitled to the reliefs sought.

A. Whether the Plaintiffs have sufficiently proved their claim on Adverse Possession Claim of Adverse Possession
20. Sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act* provides the statutory framework for the doctrine of adverse possession.
21. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*,.....”
22. The requirements for a claim of adverse possession are now well settled; The land in question must be registered in the name of a person other than the Plaintiff, the Plaintiffs must demonstrate that they took possession of the parcel of land, asserted their rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, the Plaintiffs must also demonstrate that their possession and occupation of the said land was not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.
23. With regards to the possession, onus is on the plaintiffs to establish the date they took possession, the nature of their possession, the duration of their possession and whether the same was open and



uninterrupted for the 12 years' statutory period. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Muniyifwa Songoi* [2020] eKLR)

24. I will now proceed to analyse the rival position of the parties and the various exhibits relied on by the parties' vis a vis the necessary requirements to be proved in a claim of adverse possession. The first ground to be proved is whether the suit is registered in the name of a person other than the Plaintiffs.
25. The registration of the suit land is not in dispute; the original parcel No. South Sakwa/ Kogelo/320 measuring approx. 31.5Ha, was registered in the name of the 1<sup>st</sup> Defendant's grandfather sometimes in the year 1973. Upon his death, the land was subsequently registered in the name of the 1<sup>st</sup> Defendant's father who later transferred the same to the 1<sup>st</sup> Defendant to hold in trust for the rest of the family members. The original suit land has since been subdivided into 2 portions; parcel No. South Sakwa/ Kogelo/1567 and 1568 both registered in the name of the Defendants. This fact was further confirmed by a copy of the Green Card relied on by the Plaintiffs and by the Defendants in their pleadings.
26. What however appears to be in dispute is the manner in which the said registration was procured. It is the plaintiffs claim that the registration of the suit land in the name of the defendants and previously in the names of the 1<sup>st</sup> defendant's deceased grandfather and father was done fraudulently and illegally. The Plaintiffs outlined the particulars of fraud thereof and maintained that they are the actual and original owners of the suit land and have absolute rights over the same.
27. The defendants on the other hand averred that the registration in the name of their deceased grandfather was the first registration done after the Adjudication process in the area sometimes in the year 1973. They thus contend that in case of a dispute arising from an adjudication process, the plaintiffs ought to have filed an objection as per the provisions of the [Land Adjudication Act](#) before the filing of the instant suit.
28. It is now settled that in a claim of adverse possession, a claimant must acknowledge the title of the actual land owner/ title holder of the suit land in which he seeks to dispossess. In the instant case, the plaintiffs have not acknowledged the title and ownership of the defendants over the suit land. They cannot therefore seek to dispossess a title that they contend was procured fraudulently and further maintain that they are the original land owners with absolute rights.
29. The next issue and which is at the core of a claim for adverse possession is the issue of possession and occupation of the suit land. As earlier pointed out, the plaintiffs bear the burden to demonstrate the duration and nature of their possession, whether the same was with the intention to dispossess the actual land owners and whether the same gave rise to any prescriptive and overriding rights over the suit land, capable of registration.
30. The suit herein was canvassed by way of written submissions, parties therefore had the duty to demonstrate how the facts and evidence filed in court proved their claim in their submissions. It is imperative to note that the plaintiffs' submissions was a repetition of the contents in the originating summons and the supporting affidavit, they also urged the court to rely on the witness statements and list of documents without providing a nexus therein with the elements that must be proved in a claim of adverse possession.
31. There was no demonstration by the plaintiffs of when they took possession or whether they are in actual possession and/or use, when the said occupation and/or use became adverse to the rights of the defendants over the said parcel of land, it is not clear when the time for adverse possession started running and when the same crystallized. On the flip side, they maintained that they are the original and actual owners of the suit land and the registration of the land in the name of the defendants was an irregular acquisition which is bad in law.



32. On the contrary, it was the defendants claim that they have been in actual possession and use of the suit land since registration and that the plaintiffs do not reside or use the suit land at all.
33. The question that therefore follows is whether the plaintiffs have been using the suit land for the 12 years statutory period as alleged and whether the said use was with the intention to dispossess. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)
34. There was no nexus and explanation or demonstration of the principles of adverse possession by the plaintiffs. The Plaintiffs in their submissions did not attempt to demonstrate the merits of their case; how the documents in their supporting affidavit supported their claim of adverse possession. There was no proof by the Plaintiffs that they are in actual and physical occupation and use of the suit land and a demonstration of how the said possession and use is adverse to the rights of the Defendants as the title holder. In addition, the plaintiffs admitted in their Supporting Affidavit that they donated portions of their land parcel to the community to be used as grazing and watering points by the community. How then can it be said that they have been in actual possession and use of the suit land and for what period?
35. The totality of the foregoing is that the Plaintiffs have failed to sufficiently demonstrate that they have acquired prescriptive rights over the portion of the suit parcel measuring 31.5Ha by way of adverse possession. Therefore, it is the finding of this court that the Plaintiffs have failed to prove their claim on a balance of probabilities to warrant the reliefs sought.
36. Consequently, having held that the Plaintiffs have failed to prove their claim on adverse possession against the Defendants' title, I find that they are not entitled to the reliefs sought in the Originating Summons

#### **Costs**

37. The general rule is that costs follow the events, the party who institutes a suit will bear costs if the suit fails. In the instant case, the Defendants were inconvenienced for defending the suit against them. I therefore find that they are entitled to the costs of the suit.

#### **CONCLUSION**

38. The upshot of the above is that the Plaintiffs have failed to prove their claim against the Respondents and I accordingly dismiss the Originating Summons dated 27<sup>th</sup> February, 2019 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 6<sup>TH</sup> DAY OF FEBRUARY, 2024.

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of;**

Mr. Agure Odero for the Plaintiffs

Mr. Achola for the Defendants

Court Assistants - Tom Maurice/Victor

