



**Okumu & 3 others v Oginda & 3 others (Environment & Land Case 42 of 2021) [2024] KEELC 550 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 550 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 42 OF 2021  
GMA ONGONDO, J  
FEBRUARY 5, 2024**

**BETWEEN**

**BARNABAS OKUMU ..... 1<sup>ST</sup> PLAINTIFF  
BENJAMIN OCHIENG WAORE OKUMU ..... 2<sup>ND</sup> PLAINTIFF  
GEORGE YASHON OMBADO OKUMU ..... 3<sup>RD</sup> PLAINTIFF  
PETER AYUB ROBERT ODHIAMBO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**MARTIN OTIENO OGINDA ..... 1<sup>ST</sup> DEFENDANT  
PHILIP ONYANGO OGINDO ..... 2<sup>ND</sup> DEFENDANT  
BENARD OGINDO OKATCH ..... 3<sup>RD</sup> DEFENDANT  
PAUL TINGA OKATCH ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. The present suit revolves around property known as Kanyada/Kanyadier/220 also known as Kanyadier Adjudication section plot number 220 (The suit property herein) measuring approximately Five Decimal Zero Hectares (5.0 Ha) or 12.5 Acres in area. It is located within Homa Bay County.
2. The plaintiffs are represented by the firm of Wasuna and Company Advocates.
3. The defendants are represented by the firm of Ochillo and Company Advocates.



## B. The Parties' Respective Cases

4. The plaintiffs sued the defendants by way of a plaint dated 23<sup>rd</sup> June 2011 and lodged in court on 7<sup>th</sup> July 2011, for the orders infra;
  - a. Re-imbusement of the special damages of Kshs. 1,157,487 as set out in paragraph 14 of the Plaint and/or an order directed as against the Defendants requiring them to restore the Plaintiff's property to its original state.
  - b. A declaration that the suit property belongs to the Plaintiffs.
  - c. A declaration that the actions of the defendants in encroaching, constructing on and interfering with the boundary marks on the suit property, amount to trespass.
  - d. Consequent to the grant of prayer (c) supra an order of vacant possession and eviction orders as applicable.
  - e. A permanent injunction restraining the defendants from trespassing on and/or interfering with the suit property including the boundary marks thereon in any way manner or form.
  - f. Costs of the suit.
  - g. Interest on a) and f) above at court rates.
  - h. Any further order or other relief that the court may deem fit to grant.
5. In a nutshell, it is the plaintiffs' lamentation is that they are registered as the joint proprietors of the suit property which was originally purchased by their father, Obadia Ambar Okumu (the Deceased) from joint sellers, Gor Akeyo and Marienga Anduko by a written agreement made on or about on or about 28<sup>th</sup> April 1977 which was condensed into a further written agreement made on 3<sup>rd</sup> October 1977 in the presence of the then chief of West Kanyada Location. That full purchase price was paid thereof to the joint sellers by the deceased and confirmed on 22<sup>nd</sup> December 1977 by way of an affidavit executed before the District Magistrate at Homa Bay. That the deceased was registered as the proprietor of the suit property after hearings and determinations of disputes in respect of the suit property before, among others, the Land Adjudication Committee, the Arbitration Board, the Objection Board and finally the Minister of Lands and Settlement.
6. Further, after the deceased died on 30<sup>th</sup> July 2007, the plaintiffs were in turn registered as proprietors of the suit property further to an application lodged with the Land Adjudication Officer sometimes in December 2008. That on various dates including 22<sup>nd</sup> May 2011, the defendants together with their servants/agents trespassed into the suit property, affecting the plaintiff's quiet possession of it. Thus, it proved the instant suit.
7. PW1 was Ezekiel Kirimi, Land Adjudication Officer in charge of Homa Bay County who stated that the Deceased filed a committee case on 6<sup>th</sup> May 1982. The same was heard and dismissed on 3<sup>rd</sup> July 1982 by the Land Adjudication Committee as per the proceedings-PExhibit 1. That the Deceased was not satisfied with the decision and appealed to the Appeal Board who heard the appeal and set aside the decision of the Committee as disclosed in the proceedings-PExhibit 2. Thereafter, one Sila Oguttu Nyandibo filed an objection which was heard and it was decided that the suit property be subdivided and a new number 5637 be owned by the said Nyandibo while the suit property to be owned by the deceased. On appeal, the Minister held that number 5637 be reverted to suit property. A further objection to be said decision by Grace Okumu, widow of the deceased was upheld to the effect that the suit property be owned by the plaintiffs to hold land in common/equal shares and that the plaintiffs



- be registered accordingly. Also, PW1 relied on other documents including the Minister's decision (PEXhibit 4) and Land Adjudication officer's consent and report (PEXhibit 6 and 7 respectively).
8. The 1st plaintiff, Barnabas Joram Okumu (PW2) stated that he is the 1<sup>st</sup> born of the Deceased. He relied on his statement dated 24<sup>th</sup> December 2013 as part of his evidence. He testified in part that his father, the deceased acquired the suit property through land adjudication. That on 17<sup>th</sup> December 2007, the suit property was registered in his name alongside his three brothers/co-plaintiffs as per the title which shows 3.26 hectares instead of 5.0 hectares as it's acreage-PEXhibit 8.
  9. Grace Obuya Okumu (PW3) relied on her statement herein. She testified, inter alia, that she is the wife/widow of the deceased and the plaintiffs are her sons. That she obtained a grant in respect of the estate of the deceased (PEXhibit 9) which also shows that the 1st plaintiff is an administrator of the Estate of the Deceased. That before adjudication, the suit property was in the name of two brothers who sold it to the deceased in 1977. Further, she relied on PEXhibits 1 to 16 which include; A sketch map (PEXhibit 10) and photographs (PEXhibit 14 in her testimony.
  10. In their statement of defence dated 4<sup>th</sup> November 2011, the defendants stated that the alleged sale agreement between Obadiah Ambar Okumu, Gor Akeyo and Mariega Anduko as stated in paragraph 5 above, is non-existent, forged, invalid, null and void. That the 3<sup>rd</sup> defendant has been in exclusive, effective and quiet possession, occupation, power and use of the suit property which is customary and land inherited from his late father John Okumu and that the plaintiffs have never occupied the same. That the 3<sup>rd</sup> defendant has the right to claim it by way of adverse possession in a different action against the plaintiffs and sons.
  11. The defendants denied the plaintiff's claim and termed this suit incurably defective, irregular, incompetent, non-starter for both want of form and locus standi. Therefore, they prayed for dismissal of the plaintiffs' suit with costs.
  12. The 3<sup>rd</sup> defendant, Benard Ogindo Okatch (DW1) testified that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are his sons while the 4<sup>th</sup> defendant (Deceased) was his brother. He relied on his statements dated 4<sup>th</sup> February 2012 and 27<sup>th</sup> February 2012 as part of his testimony and stated, inter alia, that he has occupied the suit land since 1968. That PW3 attempted to enter the suit land in 2009. That Kisii HCCC No. 34 of 2009 case determined in their favour and relied on the evidence of Grace Obuya in the proceedings of that suit as revealed in the defendants' list of documents dated 27<sup>th</sup> February 2012 S/No. 2 (DEXhibit 1). He denied the plaintiffs' claim and urged the court to dismiss the suit with costs.
  13. By the submissions dated 8<sup>th</sup> November 2023, the plaintiffs' counsel made reference to the orders sought in the plaint and gave the background of the matter. It was submitted in part that the plaintiffs were issued with title to the suit property lawfully, legally and followed due process of the law thereof. That the defendants' claim for ownership of the suit property is misplaced and have not produced any evidence in rebutting the plaintiffs' case.
  14. To reinforce the submissions, counsel cited sections 5, 26, 27 and 28 of the [Land Adjudication Act](#) Chapter 284 Laws of Kenya, Mbira-vs-Gachuhi (2002) KLR 137 and Jackson Kiptoo-vs-The Honourable Attorney General (2009) KLR 657. That the plaintiffs have proved their case on a balance of probabilities and that judgment be entered in their favour with costs.
  15. In the submissions dated 22<sup>nd</sup> January 2024, learned counsel for the defendant referred to the prayers at the foot of the plaint and that the defendants denied the plaintiff's claim in their statement of defence. Counsel submitted, inter alia, that the suit is fatally defective for want of consent of the Land Adjudication officer under section 30 of the [Land Adjudication Act](#) (supra) hence, this courts lacks jurisdiction to entertain the suit.



16. Counsel submitted that the plaintiffs have not proved their case and that the suit is res judicata. That the same be dismissed with costs to the defendants. To buttress the submissions, counsel relied on section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, Independent Electoral & Boundaries Commission-vs-Kiai & 5 others (2017) eKLR and Lutta-vs-Tanaki (2003) 2 EA 556.

### **C. Points for Determination.**

17. It is settled law that the issues for determination 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.
18. On that score, the issues for determination in this suit crystallize to whether;
- a. The suit property belongs to the plaintiffs,
  - b. The defendants have trespassed into the suit property,
  - c. Subject to issues (a) and (b) above, are the plaintiffs entitled to the orders sought in the plaint?

### **D. Analysis and Determination.**

17. Notably, it is the duty of this court to evaluate and analyse all the evidence on record herein; see PIL Kenya Ltd-vs-Oppong (2009) KLR 442.
18. The testimony of PW1 was that the suit property is registered and titled in the names plaintiffs. He produced his report (PEXhibit 7) in evidence.
19. PW2 stated that the suit property is registered in his name and that of his brothers, other plaintiffs. That they have been issued with title to the suit property-PEXhibit 8.
20. In cross examination, he stated thus;
- “ .....Land parcel 220 is registered in our name and we possess the same.....”
17. On his part, DW1 stated in cross examination that;
- “ .....the suit land belongs to my clan. I am not the only remaining person in my clan.....”
17. It is noted that the plaintiffs pleaded the particulars of trespass at paragraph 10 of the plaint, inter alia;
- a. moving and/or interfering with the boundary marks of the suit property.
    - a. Encroaching on the land.
17. In Clerk and Lindsell on Torts 18<sup>th</sup> Edition paragraph 18-01, the term “Trespass” means;
- “ An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil also constitutes trespass. There was no cultivation and or residence on parcel No. 220.....”
17. Similarly, where trenches had been dug across the plaintiffs' land was found to amount to trespass; see James Njeru-vs-Ericson Kenya Ltd (2015) eKLR.



18. Under cross examination, PW1 stated of the suit property...
- ”....there was no apparent evidence of trespass by the defendants.....”
17. In cross examination, PW2 testified as follows;
- “ ....We use the land for livestock faming...there is no physical interference by the defendants.....”
17. DW1 stated in examination in chief that he has been in occupation of the suit property since 1968. That it is PW3 who attempted to enter it in the year 2009.
18. It is noteworthy that special damages must be specifically pleaded and proved at trial with certainty and particularity; see *Ouma-vs-Nairobi City Council (1976-80) 1 KLR 375* and *Great Lakes case (supra)*.
19. The plaintiffs set out the particulars of loss and special damages at paragraph 14 (a) to (g) which include;
- a. Assorted items lost during the attack Kshs. 11,260.
  - b. Personal items lost Kshs. 223, 575.
17. The defendants asserted that they inherited suit property from their late father. Trusts including customary trusts are overriding interests over registered land under section 28 of the *Land Registration Act, 2016 (2012)*.
18. It is trite law that some of the elements that would qualify a claimant as a trustee include; that the land in question was before registration, family, clan or group land and that rights and interests previously vested in such family, clan or group under customary law are not extinguished upon registration of trust land; see *Isack M’Inanga Kiebia-vs-Isaaya Theuri M’lintari and another (2018) eKLR*.
19. Nonetheless, it is common baseline that the suit property is registered in the name of the Plaintiffs. Clearly, PW1, PW2 and DW1 testified that the defendants have not trespassed into the suit property.
20. In sum, it is the finding of this court that the plaintiffs have not established on a balance of probability, that the defendants trespassed into their land namely, the suit property. Thus, their claim fails and they are not entitled to the orders sought in the plaint herein.
21. A fortiori, this suit be and is hereby dismissed with costs to the defendants.
22. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 5TH DAY OF FEBRUARY 2024**

**G. M. A ONG’ONDO**

**JUDGE**

**PRESENT;**

- 1. Saro Otieno learned counsel for the plaintiffs**
- 2. Jack Bunde learned counsel for the defendants**
- 3. Terence Luanga, court assistant**

