



**Abuga v Chairman, Secretary & Treasurer Ting'a Farmers Cooperative Society & another
(Environment & Land Case 227 of 2016) [2024] KEELC 1222 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 227 OF 2016**

M SILA, J

MARCH 5, 2024

BETWEEN

CHARLES OKEMWA ABUGA PLAINTIFF

AND

**THE CHAIRMAN, SECRETARY & TREASURER TING'A FARMERS
COOPERATIVE SOCIETY 1ST DEFENDANT**

KISII COUNTY GOVERNMENT 2ND DEFENDANT

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 2 August 2016 initially only against the 1st defendant, Tinga Farmers Cooperative Society. The plaint was subsequently amended on 30 July 2020 to include the County Government of Kisii as the 2nd defendant. In the amended plaint, the plaintiff avers that in 1991, alongside two other claimants, he filed the suit Kisii HCCC No. 462 of 1991 against one Otwori Monyoncho (now deceased) and a finding was made that the said Otwori Monyoncho, though registered as the proprietor of the land parcel Central Kitutu/Monyerero/1215, held the same in trust for the claimants in the said suit. He has pleaded that he thereafter took possession of the land, which he perceived was being held in trust by the said Otwori, and that he put up residences, grazed cattle, planted crops and trees. He has pleaded that in the month of August 2015, while undertaking agricultural activities on the land, he was arrested, following complaints raised by the officials of the 1st defendant, and he was charged for the offence of trespass in Kisii Chief Magistrate's Court, Criminal Case No. 2296 of 2016. He avers that he has established that the parcel No. 1215, which was the subject of previous litigation, does not consist of the entire land that Otwori Monyoncho held in trust for him and the other claimants, since there was another title which the said Otwori failed to disclose at trial that he was holding in the same capacity as trustee, which is the land parcel Central Kitutu/Monyerero/1216 (the suit land or simply parcel No. 1216). The plaintiff avers that he has



established that in the year 1975, Otworu illegally transferred the suit land to Gusii County Council, and the Council in turn transferred it to the 1st defendant in the year 2002. The plaintiff contends that the suit land and the parcel No. 1215 arose from the subdivision of the parcel Central Kitutu/Monyereo/331 which was subdivided into the parcels No. 1215 and 1216. He pleads that when he filed the previous suit he was mistaken that the parcel No. 1215 covered all the land that Otworu was holding in trust. He has pleaded that he subdivision and sale of the suit land was illegal on the following particulars, that :

- a. At the time the suit land was being transferred the title was non existent.
 - b. The transfer was done before the title could be registered.
 - c. There was nothing to transfer since the suit land was not in existence.
 - d. Otworu Monyoncho (deceased) had no capacity to sell the suit land as he was holding it in trust for the plaintiff and other claimants.
 - e. Failing to make disclosure of the entire land to the plaintiffs.
 - f. The purported sale and transfer relate to illegal transactions.
 - g. The defendants went ahead to take the title despite knowing the irregularities made in obtaining the title.
 - h. The procedural irregularities have occasioned substantial injustice.
2. The plaintiff further pleads that he has lived continuously and uninterrupted in the suit land for a period exceeding 12 years preceding his arrest for trespass and has therefore acquired prescriptive rights over it. In this suit, he seeks the following orders (slightly paraphrased for brevity) :-
- a. A declaration that at all material times Otworu Monyoncho held in trust for the plaintiff and the other claimants in Kisii HCCC No. 462 of 1991 the parcel Central Kitutu/Monyerero/331 and which title upon subdivision resulted into parcels No. 1215 and 1216.
 - b. A declaration that the registration of the defendants as owners of the suit land is a nullity ab initio.
 - c. An order directing the District Land Registrar, Kisii, to rectify the register in respect of the suit land and have the plaintiff and the other claimants in Kisii HCCC No. 462 of 1991 registered as absolute owners thereof.
 - d. Costs of the suit.
3. The 1st defendant filed defence which she later amended to inter alia include a counterclaim. She pleaded that she is the registered and lawful proprietor of the suit land. She pleaded that she obtained the land in 1974 from Gusii County Council, and has since been in exclusive and peaceful occupation of it, and in the year 2002 the Council transferred title to her. It is pleaded that the 1st defendant made structures on the land which are there to date. She avers that at the time title was acquired, the 1st defendant had no notice of any claim to the land, and she was not a party to the suit Kisii HCCC No. 462 of 1991 and is not aware of it. She pleads that it is over 30 years since she acquired the land and the plaintiff has no claim over it. She contends that it is not true that the plaintiff has been carrying out activities on the land and averred that he only came to the land in August 2015, which is what caused her to lodge the complaint of trespass, and that the plaintiff was arrested and charged and cannot claim adverse possession. It is further pleaded that the plaintiff's claim is caught up by limitation of actions. It is denied that there is any trust and it is pointed out that the "other claimants" mentioned by the



plaintiff have not been added as parties to this suit. It is also pleaded that the plaintiff ought to have exhausted his claim in the suit Kisii HCCC No. 462 of 1991. In the counterclaim, the 1st defendant seeks the following orders :-

- a. A declaration that the 1st defendant is the lawful registered proprietor of the suit land measuring 0.28 Ha;
 - b. A declaration that no trust accrues to the plaintiff in relation to the suit land;
 - c. An order of eviction against the plaintiff and anyone claiming from him;
 - d. A permanent injunction to restrain the plaintiff from the suit land;
 - e. General damages for trespass;
 - f. Costs of the suit and of the counterclaim;
 - g. Interest at court rates;
 - h. An order to have the Officer Commanding Kisii Police station to assist in ensuring implementation of the orders of court;
 - i. Such other order that the court may deem fit to grant.
4. The 2nd defendant did not enter appearance nor participate in the suit.

B. Evidence of the Parties

5. The plaintiff testified that Otworu Monyoncho was his uncle and was given the land by his father (plaintiff's grandfather) to hold in trust for the plaintiff's father. He testified that Otworu had his own land which was parcel No. 254 measuring 6.2 acres about a kilometer away. He stated that the original land was parcel No. 331 which was later subdivided into the parcels No. 1215 and 1216. He stated that when they sued Otworu in the earlier suit, they only sued in respect of the parcel No. 1215, as they did not know of the existence of the parcel No. 1216 (the suit land). He testified that he did not know that Otworu had sold the land to the 1st defendant and claimed that he has never met anyone from Ting'a Farmers on the land. He stated that he has fenced both the parcels No. 1215 and 1216 and that at some point a road was created through the parcel No. 1216 and that it was his wife who was compensated for the trees that were cut in order to create the road. He testified that he has been using the whole of the parcel No. 331 not knowing that there is a parcel No. 1216. He testified that after judgment, they took possession. They found a 'mabati' structure on the land that was being used by the 1st defendant as a Chief's office and that the defendants constructed a permanent structure in 2017/2018 while this case was pending. He testified that he was arrested when he started cultivating the land and was charged for trespass but the criminal case was dismissed.
6. Cross-examined, he testified that he is claiming the suit land on behalf of his brother, late mother and sisters. He however did not exhibit any authority from them to file suit. He affirmed that he lodged the previous suit with two others in respect of the parcel No. 1215 which measures 0.63 Ha. He claimed that he was entitled to sue over the suit land as Otworu handed over to them the whole of the parcel No. 331 in 1994. They got title for the parcel No. 1215 in 1995. He contended that Otworu held the whole of the parcel No. 331 in trust for them. He stated that he only came to know of the existence of a title to parcel No. 1216 in the year 2015 when they were still using the land. He was questioned on the 'mabati' structure and he stated that he found it on the land when Otworu handed it over to them. He claimed to have asked Otworu about it and he was told that he allowed them to build a temporary shed to store pyrethrum but he had not sold the land. He contended that Otworu ought not to have



- sold the suit land as he did not own it. Re-examined, he inter alia stated that there were cypress trees demarcating the parcels No. 1215 and 1216 which were cut in the year 2014. He affirmed that at the moment there is the 'mabati' structure and a permanent stone structure which hosts the Chief's office that he claimed was built in 2017.
7. PW – 2 was Thomas Orina Monyoncho, a step-brother of the plaintiff's father (Zakaria). He testified that their grandfather gave Zakaria land but he died. This land was then given to Otwori to hold on behalf of the family of Zakaria and he stated that Otwori was not supposed to sell it. He stated that Otwori was not keen to hand over the land and he was sued and forcefully removed from the whole of the land. He stated that they did not know that the land had two titles on the ground and only came to be aware 'in the year 2020 when the plaintiff was arrested.' Cross-examined, he testified that he knows the land well but does not know its acreage.
 8. PW- 3 was William Mainga Monyoncho another step brother of Zakaria. His evidence was more or less the same as that of PW-3. He testified that according to them the land bore the title No. 331 and did not know about the subdivisions. He stated that they only came to know of the subdivisions after the plaintiff was arrested. His view on the 'mabati' structure on the land was that it was leased and not sold so that people do not have to go far to deliver pyrethrum.
 9. PW- 4 was Vincent Mogaka Karani, a cousin of the plaintiff. PW -5 was Samuel Ongera Nyakundi another cousin of the plaintiff. Their evidence was along similar lines to the evidence of PW-2 and PW-3.
 10. With the above evidence, the plaintiff closed his case.
 11. DW- 1 was Mary Mayieka a retired Chief of Ngenyi Location. She testified that she became Assistant-Chief in the year 2001 and appointed a substantive Chief in 2005. She testified that when she served as Assistant Chief, they used the 'mabati' structure on the suit land as an office upon being permitted to do so by the 1st defendant. That structure was previously used to store pyrethrum. She testified that the 1st defendant passed a resolution to donate a portion measuring 25 X 134 feet to build a permanent office. in 2015, they requested the Constituency Development Fund (CDF) to give funds to develop a permanent office building and construction of the office commenced in 2016 without anybody complaining. She testified that there was an open area that was used by people to graze which the plaintiff started tilling. She got concerned by his activity and called the officials of the 1st defendant. They made a report but the following day the plaintiff cut a tree and he was arrested. She testified that nobody brought any order to stop construction of the Chief's office which was made using public funds.
 12. Cross-examined, she testified that the land was used as a Chief's office from the 1970s. When she was married into the locality in 1979, she found the Chief's office there. She testified that the 1st defendant allowed them to use the structure for free. She testified that the land that had a dispute was the parcel No. 1215 and not the suit land. They were using the parcel No. 1216. She testified that there are mature cypress trees separating the parcels No. 1215 and 1216 and a live fence. She testified that at some point some trees were cut by one Nyangaresi who was from Otwori's family and the Society allowed him to cut them on the basis that they were planted by his father. According to her there were no trees to be cut when the road and powerlines were made. On the permanent structure made, one room is used by the police as they await completion of a Chief's office in Isecha Location. She stated that this land is on the lower side (abutting a road) whereas the parcel No. 1215 is on the upper side.
 13. DW- 2 was Peter Ondieki Sitara. He served as Secretary of the 1st defendant from 2005 to 2018. He testified that they operated well and had no issue regarding the land until 9 August 2015 when the



Chief called him and informed him that a person had come to the land and started cultivating it. They reported the matter at Rioma Police Station and the plaintiff was arrested and charged with trespass. He recalled that in 2008 a tarmac road was made and trees felled which were taken by the children of Otwor. He recalled paying the plaintiff Kshs. 1,500/= to split the felled trees at that time. He testified that the land was fenced and was only open on the side adjacent to the tarmac road. Cross-examined, he testified that the land was given to the Society by the Gusii County Council. He was not there when the transactions were done.

14. DW – 3 was Elijah Marasi Anyanga. He is the present Chairman of the 1st defendant. He asked that the prayers in the counterclaim be allowed. He testified that the 1st defendant got title after following the requisite procedures. He referred to a photograph taken to show that there exists a boundary between the parcels No. 1215 and 1216. He reiterated that they have been utilizing the land from 1975 without any issue until 2015 when the plaintiff trespassed into it despite there being boundaries. They obtained title in their name on 22 July 2012. He testified that they gave out a portion of the land for building of a Chief's office and there is now the Chief's office, Education office and other public offices.
15. He was cross-examined on the documentation that brought forth title in the 1st defendant's name. He was not privy of the transaction between Otwor and the County Council.
16. DW – 4 was Mary Kwamboka Ogero the present Secretary Manager of the 1st defendant. Her evidence was no different from what the other defence witnesses stated.
17. With the above evidence the defence closed its case.
18. I invited counsel to file written submissions, which they did, and I have taken these into account before arriving at my decision.

C. Analysis and Disposition

19. The suit land (parcel No. 1216) arose from a subdivision of the parcel No. 331, which was subdivided into the parcels No. 1215 and 1216. The parcel No. 331 was originally registered in the name of Otwor Monyoncho at the time of adjudication. What the plaintiff alleges is that Otwor Monyoncho held the whole of the land comprised in the parcel No. 331 in trust for him and his family. He and other persons, who appear to have been his mother and siblings, had earlier filed the suit Kisii HCCC No. 462 of 1991, their suit being limited to the parcel No. 1215, wherein they contended that it was held in trust for them by Otwor. Judgment was entered in their favour on 25 July 1994 and the said land parcel No. 1215 was transferred to them sometime in the year 1995. The plaintiff has now come back to court to claim the parcel No. 1216 on the contention that when he filed suit in the year 1991, he was not aware that the land parcel No. 331 had been subdivided into two for he was in possession of the whole of it.
20. This allegation that the plaintiff was not aware that the land parcel No. 331 had been subdivided into the parcels No. 1215 and 1216 cannot be taken seriously. When he and his family filed suit in the year 1991, he knew, or ought to have known that the parcel No. 1215, which he claimed in that case, resulted from a subdivision of the parcel No. 331. He knew, or ought to have known that the parcel No. 331 was subdivided into the parcels No. 1215 and No.1216. This evidence was readily available at that time and they must have known about the subdivision, for the parcel No. 1215 was not an original number upon adjudication. Even assuming that they did not know about it, which I am not persuaded, then they could easily have known that what they were claiming then was a subdivision of the parcel No. 331 and that there was another parcel (this parcel No.1216) that was also a product of the subdivision. If he and the family thought that they deserved to have the whole of the land parcel No.331, i.e deserved to have judgment for both the parcels No.1215 and 1216, then they ought to have filed suit that claimed both the parcels No. 1215 and 1216, at that time, so that they can plead the whole of their case and



one judgment is made. The plaintiff cannot plead ignorance of the fact that the suit land also existed in the year 1991 when he and the rest of his family first came to court.

21. Now, if it is the plaintiff's case that this parcel No. 1216 also ought to be declared that it was being held in trust by Otworu Monyoncho, then the plaintiff needed to sue Otworu Monyoncho, or his estate, so that they can have an opportunity to state their position on this allegation, in the same way that they sued him in 1991 over the parcel No. 1215. But nowhere has the plaintiff sued Otworu Monyoncho or his estate within this case and it will be condemning them unheard if I proceeded to make a declaration that Otworu held the suit land in trust for the plaintiff and/or the plaintiff's family.
22. But I even have serious doubts as to whether the plaintiff and his family were ever of the inclination that Otworu Monyoncho ever held the suit land in trust for them. If they were of this persuasion, they would have included the suit land in the suit that they filed in 1991, but they did not. I have in fact gone through the proceedings of the case of 1991 and particularly the evidence of Prisca Mosomi, the mother of the plaintiff herein. Her evidence was that the boundaries of the land that was held in trust measured 0.63 Ha. That is more or less the measurement of the land parcel No. 1215. The entire parcel No. 331 measured 0.9 Ha. If the claimants in the suit of 1991 were of the conviction that the land that was held in trust measured more than 0.63 Ha, they would have included the suit land as well in their previous case. The fact that they did not brings one to the inclination that they were not of the opinion that the suit land was also held in their trust. Indeed, the other persons who were in the suit of 1991 are not in the suit herein, and it makes the plaintiff appear as a lone ranger who does not have the blessings of the rest of his family in pursuing this case, yet he claims that it is held in trust for the whole of the family. I doubt that he has the blessings of his mother and siblings for they never filed any authority allowing him to file suit on their behalf.
23. In his pleadings and evidence, the plaintiff alleged that after the judgment in the 1991 case, he took possession of the whole of the land, meaning the suit land and the parcel No.1215, and that he undertook agricultural activities therein uninterrupted until 2015. Nothing could be further from the truth. The evidence is stark that this parcel No. 1216 was separated from the parcel No. 121 by a fence and that the suit land hosted the Chief's office in a 'mabati' structure that was previously used to store pyrethrum. How can the plaintiff allege that he had taken possession when this land was actually under the Chief? I don't believe him at all. In fact the evidence of DW-1 is the more credible evidence. Her evidence was clear and elaborate that this land was under the Chief's control from the 1970s, and this is where the Chief's office existed for all that period, with the land around the office being left as an open area that was certainly not under the possession of the plaintiff. I am persuaded that the truth of the matter is that the plaintiff started developing ideas that he could also have the suit land on the basis of the claim of trust because it was initially registered in the name of Otworu, and that it was in the year 2015 that he moved into the land, not any time earlier than that. To demonstrate possession, the plaintiff alleged that he was compensated for trees that were on the suit land and he produced a compensation form from Kenya Power & Lighting Company Limited. I have looked at that form, and from what I can see, the person compensated was one Esther Nyamechi, who the plaintiff claimed to be his wife, but compensation was not for any crop damage to the suit land but to the parcel No. 1215. The form is in black and white and speaks for itself. There is absolutely no evidence of any compensation given to the plaintiff or his family for any damage to trees or crops that were in the parcel No. 1216 and thus no evidence whatsoever of any quarter having recognized that the plaintiff and/or his immediate family had any claim over this land for them to deserve compensation. The allegation that the plaintiff was in possession of the suit land and undertaking agricultural activities on it up to 2015 is simply far fetched and an outright lie.



24. There are pleadings by the plaintiff that the transfer of the suit land from Otworì Monyoncho to the Gusii County Council and ultimately to the 1st defendant was fraudulent. There was particular reference to the documents of transfer in respect of this land. In her submissions, counsel for the plaintiff pointed out that the Green Card to the parcel No. 331 shows that Otworì became registered as proprietor on 20 March 1973. She wondered how Otworì could have signed transfer for the suit land to Gusii County Council on 28 September 1973, yet the register of the suit land shows that it came into existence on 3 February 1975. The explanation is very simple. From the documents it is correct that the parcel No. 331 was created on 20 March 1973. The land was thereafter subdivided but I cannot see from the register the actual date of subdivision. In respect of the suit land, a transfer from Otworì to Gusii County Council was indeed received on 28 September 1973. But this transfer was not registered until 3 February 1975 and this is obvious from the document itself which shows the date of registration as 3 February 1975. It is therefore on 3 February 1975 that the actual registration of the parcel No. 1216 in name of Otworì and subsequent transfer to Gusii County Council were registered. The documents were signed earlier but the registration was done later. There is nothing abnormal here, for documents can be prepared then registered later, and therefore heavy weather cannot be made on the date of 28 September 1973 in the transfer document. On my part I see absolutely no evidence of fraudulent transfer from Otworì to Gusii County Council and from Gusii County Council to the 1st defendant.
25. But probably most significantly, this case is time barred, so that even if the plaintiff had made out a good case, which for the record he has not, I would still dismiss it. The time within which one needs to lodge a claim for land is 12 years which is provided in Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, which is drawn as follows :-
7. Actions to recover land
- An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
26. From the above it is apparent that one needs to lodge his action to recover land within 12 years. In this case, Gusii County Council obtained registration as proprietor of the suit land in 1975. The land was transferred to the 1st defendant on 22 July 2002. This suit was filed in 2016. It is more than 40 years since the land became registered in the name of the 2nd defendant and about 14 years since the land became registered in the name of the 1st defendant. The defence of limitation was raised by the 1st defendant but I have seen nothing in the submissions of counsel for the plaintiff addressing this point. Pursuant to Section 7 of the *Limitation of Actions Act*, the case is clearly time barred. As I earlier stated the plaintiff was aware or could have been aware of the title of the 1st and 2nd defendants from 1991 when he and other persons filed the suit in respect of the parcel No. 1215. They cannot therefore benefit from Section 26 of the *Limitation of Actions Act*, which extends the limitation period so as to commence from the time that a person came to have knowledge of the fraud, mistake or misrepresentation, for in our case, knowledge must be imputed on the part of the plaintiff at the latest in the year 1991. Even if you add twelve years from 1991, this case would still be hopelessly time barred.
27. Whichever way you look at it there is no substance in the plaintiff's case. I think the plaintiff was merely trying his luck in claiming this land but I regret to tell him that he cannot depend on luck for a case such as this. His case lacks in substance and must be dismissed. It is hereby dismissed with costs.
28. Let me now turn to the counterclaim of the 1st defendant. The 1st defendant seeks a declaration that she is the lawfully registered proprietor of the suit land. The 1st defendant has displayed title to it and I find



nothing wrong with that title. I issue the said declaration. I am also persuaded to issue a declaration in terms of prayer

- (ii) of the counterclaim that no trust accrues to the plaintiff in respect of the suit land. Prayer
- (iii) seeks an order of eviction of the plaintiff from the suit land. If the plaintiff is still trespassing on any portion of the suit land then he must give vacant possession forthwith or he be evicted. If he has to be evicted then the OCS Kisii Police Station to provide security as prayed in prayer
- (viii) of the counterclaim. I will also issue a permanent injunction in terms of prayer
- (iv) restraining the plaintiff from trespassing into the suit land. Prayer
- (v) seeks damages for trespass.

The plaintiff did trespass into the suit land in 2015. For the circumstances herein, I will award the 1st defendant a sum of Kshs. 100,000/= as general damages for trespass payable by the plaintiff. The said sum to accrue interest from the date of this judgment till settlement in full. The 1st defendant shall also have the costs of the counterclaim.

29. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Mr. Bosire Gichana for the plaintiff

Mr. Omwoyo for the 1st defendant

No Appearance for the 2nd defendant

Court Assistant – David Ochieng⁷

