



**Ondijo v Ochola & 4 others (Environmental and Land Originating Summons
52 of 2021) [2024] KEELC 3565 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 52 OF 2021
GMA ONGONDO, J
APRIL 9, 2024**

BETWEEN

ROSELINE ORIMBA ONDIJO PLAINTIFF

AND

MAURICE OTIENO OCHOLA 1ST DEFENDANT

ROBERT OGOLA OCHOLA 2ND DEFENDANT

WILKISTER ADHIAMBO OTIENO 3RD DEFENDANT

COUNTY LAND REGISTRAR, HOMA BAY 4TH DEFENDANT

HON. ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. On 17th February 2021, the plaintiff who was initially represented by Kirui and Company Advocates but is currently represented by O. P. Ngoge and Associates Advocates, initiated the instant suit by way of an Originating Summons dated 30th January 2021, pursuant to Section 38 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. She is seeking the orders infra:
 - a. A declaration that the Plaintiff is entitled to recover the whole of L. R. No. West Kasipul/Kodera/Karabach/881 measuring approximately 1.3 Ha (the suit land herein) under the [Limitation of Actions Act](#), Chapter 22 of Laws of Kenya, on grounds that the Plaintiff herein has been peacefully and continuously in active use and possession of the aforesaid land parcel well over 30 years, without any interference at all since 1987 to date.
 - b. An order that the Plaintiff Roseline Orimba Ondijo, be registered as the proprietor of the suit land herein, currently registered in the names of Wilkister Adhimabo Otieno by way of fraud.



- c. An order directing 4th defendant to register the suit land into the names of Roseline Orimba Ondijo.
 - d. An order restraining the 1st, 2nd and 3rd Defendants by themselves, their agents, servants and/or employees from interfering, encroaching, or dealing with the Plaintiff's suit land in any manner whatsoever and/or howsoever that is inconsistent with the Plaintiff's rights thereon.
 - e. Costs of this Originating Summons be borne by the Defendants.
 - f. 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 anchored on grounds (a) to (h) on the face thereof and a ten (10) paragraphed supporting affidavit of the plaintiff sworn on even date and a copy of police abstract (ROO 1) and a copy of death certificate (ROO 2) annexed to the affidavit. The plaintiff deposed, inter alia, that the suit land initially belonged to Owenga Omoro (deceased 1). That following his demise, her husband, Paul Ondijo Okombo (deceased 2), purchased the entire suit land from one Ochola Omoro who is deceased 2's brother and the father of the 1st and 2nd defendants (the vendor herein). That, however, a transfer was not done. That the 1st and 2nd defendants later obtained a grant of letters of administration to the estate of deceased 1 and subsequently sold the suit land to the 3rd defendant herein. The plaintiff averred that she has acquired the suit land by way of adverse possession, having been in active and peaceful possession thereof.
 3. Initially, the suit was filed in Migori Environment and Land Court before being transferred to this court on 21st October 2021, for hearing and determination in the spirit of access to justice as provided for under Articles 50(1) and 48 of the Constitution of Kenya, 2010.
 4. PW1, Roseline Orimba Ondijo, testified that following the purchase of the suit land by deceased 2, she has lived thereon since 1987 to date and the vendor has never tried to evict her therefrom. That the agreement relating to the sale got burn and cannot be retrieved. That she participated in Homa Bay Succession Cause No. 83 of 2016. That the vendor never obtained letters of administration to the estate of deceased 1, who was not married at the time of his demise.
 5. During cross-examination, she admitted that she does not live on the suit land but cultivates the same. That she has no document to prove cultivation thereof. She denied being found guilty of malicious damage to a dwelling house of the 3rd defendant in Oyugis Senior Principal Magistrates Court Criminal Cause No. 252 of 2021. She averred that deceased 2 obtained consent of the Land Control Board but could not produce the same, stating that they were kept in her neighbour's house which got burnt in 1998. That the idea to initiate this claim for adverse possession came up after conclusion of the succession cause and the vendor is not a party herein.
 6. The 1st, 2nd and 3rd defendants through Andrew Ombwayo and Company Advocates, opposed the claim vide a joint replying affidavit sworn on 29th September 2022 by Samson Otieno Otieno, power of attorney holder for the 3rd defendant and duly authorized by the 1st and 2nd defendants. They deposed in part that the 3rd defendant lawfully bought the suit land from the 1st and 2nd defendants who are legal representatives of the estate of deceased 1 and that the plaintiff is a trespasser thereon. They termed the plaintiff's claim false and illegal and that the same should be dismissed with costs.
 7. Notably, the 4th and 5th defendants did not participate in the instant suit.
 8. DW1, Samson Otieno Odongo, relied on his replying affidavit sworn on 29th September 2022, which were adopted as part of his evidence. Also, he relied upon his list of documents of even date serial



numbers 1 to 9 to wit, a power of attorney for the 3rd defendant, sale of land agreement dated 16th November 2017, photograph of the suit land, a letter dated 15th December 2015 by the area Chief, gazette notice dated 27th May 2016, a certificate of official search in respect of the suit land dated 8th December 2015, a certificate of official search in respect of the suit land dated 16th January 2018, a copy of ruling dated 12th November 2016 in Homa Bay High Court Succession Cause No. 83 of 2016, and a copy of court order dated 12th November 2016 in Homa Bay High Court Succession Cause No. 83 of 2016 (DExhibits 1 to 9 respectively).

9. In cross-examination, he averred that he found no occupier on the suit land when he purchased it. That he is not in occupation of the same. That he erected a structure thereon but the same was demolished by PW1 after which he instituted criminal proceedings against her in Oyugis Senior Principal Magistrates Court Criminal Cause No. 252 of 2021 but she was not found guilty of the same.
10. The plaintiff's counsel filed submissions dated 22nd December 2023 and stated that the 3rd defendant acquired title to the suit land unprocedurally, illegally and fraudulently. That by lodging Homa Bay Succession Cause No. 83 of 2016, the 1st and 2nd defendants contravened the provisions under Section 39 of the *Law of Succession Act*, Chapter 160 Laws of Kenya. Thus, counsel implored the court to allow the suit with costs in the interest of justice. Reliance was placed on the case of *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR, to buttress the submissions.
11. Learned counsel for the defendants, Otieno and Achieng' Company Advocates, filed submissions dated 20th December 2023 and stated inter alia, that the plaintiff did not present a sale agreement before this Court as proof that the suit land was purchased by her deceased husband. That further, no photographs were availed herein to confirm the nature of her occupation of the suit land. That furthermore, the allegations of fraud as against the 3rd defendant were also not substantiated. Therefore, counsel urged the court to dismiss the present suit with costs to the defendants. To fortify the submissions, counsel relied on the case of *Wambugu v Njuguna* (1983) KLR 173, among others.
12. In highlighting the submissions orally on 20th February 2024, the plaintiff's counsel stated that the defendants have not opposed the originating summons and urged the court to allow the same in the interest of justice. That the plaintiff is in possession of the suit land. That in cross-examination, DW1 could not tell whether the plaintiff took possession of the suit land in 1987.
13. On their part, the defendants' counsel stated that the Originating Summons is opposed by the Replying Affidavit sworn on 29th September 2022 and adopted as evidence in chief herein.
14. I have anxiously considered the parties' respective pleadings, evidence and written submissions. The issues for determination are as set out on the face of the originating summons and as noted in the case of Wilson Kazungu Katana and 101 others v *Abdalla Bakshein and another* (2015) eKLR, that adverse possession dictates thus;
 - a. The parcel of land in dispute 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.
15. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi v Ben Munyitwa Songoi* (2020) eKLR.



16. It is important to note that the plaintiff's claim is for the whole of the suit land measuring approximately one decimal three hectares (1.3 Ha) in area. So, the plaintiffs' claim is over a definite portion of land as held in *Mutbuita –v- Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
17. In the first instance, the suit land was registered in the name of the 3rd defendant on 13th February 2018 and a title deed issued thereto on 14th February 2018. This is evidenced by a copy of the official search certificate dated 14th March 2018 captured in the defendants' list of documents forming part of their evidence herein.
18. Concerning the issue of open and exclusive possession, the plaintiff (PW1) testified that she does not live on the suit land but cultivates the same and has planted eucalyptus thereon. However, she did not produce any evidence such as photographs in support of this assertion.
19. Notably, PW1 admitted that she has no document to prove cultivation thereof and stated thus:

“I have nothing to reveal cultivation of the suit land. I have no documents thereof...”
20. 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 Nyachico v Martin Okioma Nyauma & 3 others* (2017) eKLR. However, it is my considered view that in the present case, the same was not proven to the requisite standard.
21. As regards the period of possession and having dispossessed the owner, PW1 averred that she has been in open, quiet and peaceful use of the suit land since 1987 to date. That she took possession of the same following a sale agreement entered into between deceased 2 and the vendor. That however, the said sale agreement was stored in a neighbour's house which got burnt in a fire and she obtained a police abstract thereof.
22. In the first instance, it is important to note that the vendor (Ochola Omoro) in the purported sale agreement had not obtained a grant of letters of administration to the estate of deceased 1. Therefore, he lacked capacity to dispose of the suit land as he was not the legal representative of the estate of deceased 1; see Section 82(b) of the *Law of Succession Act*, Chapter 160 Laws of Kenya and *Trouistik Union International & another v Jane Mbeyu & another* (1993) eKLR.
23. Secondly, there is a discrepancy between the viva voce evidence of PW1 and the police abstract dated 21st December 2020 and annexed to the supporting affidavit on record, on when the purported sale agreement got burnt and the circumstances surrounding the same. Whilst PW1 testified that the burning incident occurred in 1988, the abstract shows that the same occurred in 1994. Further, the police abstract does not specify the house that got burnt or mention the neighbor, the said Elizabeth Atieno.
24. In light of the foregoing, there is nothing to establish when time started running for purposes of adverse possession in this dispute as provided for under Sections 7 and 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
25. In the circumstances, I subscribe to the Court of Appeal decision in *Kirugi and another–v-Kabiya and 3 others* (1987) KLR 347, where it was held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard by way of formal proof.
26. To that end, I hold that the plaintiff has not proved the ingredients of adverse possession to the requisite standard as held in the case of *Wilson Kazungu Katana* (supra). So, her claim must fail.
27. Accordingly, the instant suit is hereby dismissed with costs to the 3rd defendant.



28. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 9TH DAY OF APRIL 2024.

G.M.A ONG'ONDO

JUDGE

Present

Mr. Peter Ngoge, Learned Counsel for the plaintiff

Ms. Ruth Otieno, Learned Counsel for the defendants

F. Mutiva, Court Assistant

