



**Ongeri & 3 others v Nyakundi & 3 others (Environmental and Land
Originating Summons E010 of 2021 & Environment & Land Case 10 of 2023
(Consolidated)) [2024] KEELC 3984 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2021
& ENVIRONMENT & LAND CASE 10 OF 2023 (CONSOLIDATED)**

M SILA, J

MAY 2, 2024

BETWEEN

THOMAS RATEMO ONGERI 1ST APPLICANT

PAUL ONDIGI ONGERI 2ND APPLICANT

CHARLES MORIRA ONGERI 3RD APPLICANT

AND

AUGUSTANTINO OBAIGWA NYAKUNDI RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 10 OF 2023**

BETWEEN

AUGUSTANTINO OBAIGWA NYAKUNDI PLAINTIFF

AND

THOMAS RATEMO ONGERI 1ST DEFENDANT

PAUL ONDIGI ONGERI 2ND DEFENDANT

CHARLES MORIRA ONGERI 3RD DEFENDANT

JUDGMENT

1. This judgment is a consolidated judgment in respect of two suits. The first suit is Kisii ELC No. 10 of 2023, commenced by Augustantino Obaigwa Nyakundi through a plaint filed on 28 May



2021 in the Chief Magistrate's Court at Kisii against Thomas Ratemo Ongeri, Paul Ondigi Ongeri and Charles Morira Ongeri. That suit was registered as Kisii MCELC No. 68 of 2021. In that suit, the Augustantino, the plaintiff, seeks orders for a declaration that the land parcel West Kitutu/Bogusero/2940 (the suit land) belongs to him; eviction against the defendants; a permanent injunction to restrain them from the suit land and costs. The second is the suit Kisii ELCOS No. 10 of 2021 (OS), commenced through an Originating Summons filed on 19 July 2021 wherein the applicants, Thomas Ratemo Ongeri, Paul Ondigi Ongeri and Charles Morira Ongeri, sued Augustantino Obaigwa Nyakundi, seek orders that they have acquired title to the land parcel West Kitutu/Bogusero/2940 measuring approximately 0.79 Ha, through adverse possession. The two suits were consolidated and therefore the suit filed before the Magistrates' Court was brought to this court and that is why it bears a newer registration number though it was filed earlier in time. In this consolidated judgment, I refer to the claimants in the Originating Summons as applicants or defendants (depending on the context) and the respondent as respondent or plaintiff again depending on the context.

2. PW-1 was Thomas Ratemo Ongeri who stated that he was 73 years old at the time he testified. He testified that he started living on the suit land in the year 1952 when the land was owned by one Amwama Marieta (Amwama) who was a close friend of his father Agostino Ongeri (Agostino). He stated that Amwama sold to his father land measuring 3 ½ acres and that is where they reside. They are both now deceased. He testified that at the time of sale the land had not been adjudicated and his father died before he got registered as proprietor. He averred that he came to this land in 1962 (it will be observed that he had earlier testified that he came to the land in 1952) and that he has planted tea, coffee and trees and also does subsistence farming. He testified that even his siblings (the other claimants) live on this land. He produced photographs which he stated depict the suit land and show the houses and crops. Among the photographs was one showing a demolished house, which he said was of his son, and he elaborated that the house was destroyed by the respondent. He testified that he does not know how the respondent obtained registration of the land in his name. Cross-examined, he could not recall the year that his father purchased the land. He said that they were in school at the time but it was before 1952. He was aware that his brother Joakim Orero Ongeri had filed a case against the respondent and two others. In that case, Joakim had stated that their father bought the land in 1972 but he stated that this was other land which was an extension of what was bought previously though he later changed to say that it is the same land in dispute. He did not know that the case that Joakim filed was the suit Kisii HCCC No. 237 of 1994 and he did not know that the case was withdrawn. He admitted filing a case in 2004 together with the other plaintiffs herein against the respondent which is case Kisii HCCC No. 95 of 2004 (OS) and the respondent filed defence to it. He claimed that the case ended with an order that he be given the land. He denied that he instructed their advocate to withdraw the case in 2015. He admitted that the respondent demolished the house of his son on the land in 2018. He admitted that the respondent moved to execute costs given in the previous cases and he was put in jail for not paying the costs. He admitted that they have not lived on the land peacefully. Re-examined he now stated that he started living on the land in April 1994.
3. PW – 2 was Charles Morira Ongeri, the 3rd applicant in the Originating Summons. His evidence also was that their father, Agostino Ongeri purchased the suit land. He stated that he purchased it in 1972 when he was 10 years old and that it is here that he was raised. His father died before the land was transferred to him. He stated that after buying the land their father moved their brother, Thomas Ratemo Ongeri to live on it. He testified that they subdivided the land amongst themselves for purposes of cultivating it and that they use the land collectively as four brothers. He was aware that they filed the case Kisii HCCC No. 95 of 2004 (OS) but he claimed not to know how it ended. He testified that he started possessing the land in 1980 and that he has been cultivating it to date. He admitted that the respondent caused his arrest and he was taken to Nyakongo Police Station.



4. PW – 3 was Nyangaresi Mumbu a son of Amwoma Marieta. He was born in 1958. His evidence was that his father sold to Agostino Ongeru the suit land when it was parcel No. 1566. He claimed to be present at the time of sale and that the land was sold for Kshs. 3,100/=. He stated that the purchase price was used to pay dowry on his behalf and Ongeru took possession of the two acres that he bought. He stated that Ongeru died and that it is his sons (the applicants) who are now on the land. He testified that what they have planted is tea and they only farm it but nobody lives on the land. He stated that he also sold land to one Zachary Isaboke Nyaata one acre but he also took over Ongeru's portion of two acres. Zachary then sold the land to the respondent. Cross-examined, he denied selling to Zachary four acres of land. He was not aware of the title number that Zachary got or its acreage. He was not aware of the size of land that Zachary sold to the plaintiff.
5. With the above evidence, the applicants in the Originating Summons closed their case.
6. The respondent testified in response to the Originating Summons and in support of his plea. He testified that in 1994, through the case Kisii HCCC No. 237 of 1994, the applicants sued him, Zachary Nyaata and Nyangaresi Mumbu (PW-3) over land measuring 2 ½ acres that he had purchased. He stated that this case was dismissed. The applicants then filed another case, being Kisii HCCC No. 13 of 1999 (OS), and in 2004 they filed Kisii HCCC No. 94 of 2004 (OS). They never succeeded in any of the cases. He stated that there was a time he evicted them from the suit land using a court order but they came back. He also caused them to be arrested for non-payment of costs of the previous cases. Cross-examined, he denied that he wrongfully caused issue of eviction orders when none had been given in the case Kisii HCCC No. 95 of 2004. He admitted that the applicants were on the land. He stated that there was only one house on the land which he demolished. There is tea and trees on the land which the applicants planted. Re – examined he stated that it was after the other cases the applicants had filed were concluded that he filed his case for eviction in 2021.
7. With the above evidence, the respondent/plaintiff closed his case.
8. I invited counsel to file written submissions which they did and I have taken these into account before arriving at my decision.
9. The applicants in the Originating Summons wish to have title through adverse possession whereas the respondent (plaintiff in the other suit) wishes to have them evicted from the land. I will start with the claim for adverse possession because if it succeeds then the claim for eviction must fail. If the suit for adverse possession fails then I will have no reason not to allow the other suit seeking their eviction.
10. It is trite that in order to succeed in a case of adverse possession, one must demonstrate peaceful, open, continuous and uninterrupted possession of the land claimed for a duration of at least 12 years. In their case, the plaintiffs allege that their father purchased the suit land and thus they are entitled to it. They claim to be in possession because of this sale. It matters not whether the contention of the claimants is that the land was bought in 1972 or 1952 or any other year. The issue of the sale of the land in the circumstances of this case is irrelevant because the claimants have not come to court to enforce any sale agreement but have come to court asserting title by dint of adverse possession. This case was filed in 2021 and therefore what the applicants need to demonstrate is that their possession has been peaceful and continuous at least from the year 2009.
11. It cannot by any stretch of imagination be claimed that the applicants have been in any peaceful possession from the year 2009. In fact, in the year 2009, when the countdown for peaceful continuous possession starts, the applicants had a pending case with the respondent, that is the case Kisii HCCC No. 95 of 2004 (OS). That case was filed by the applicants against Zacharia Isaboke Nyaata and the respondent herein. In that case, the applicants were asking for adverse possession for the land parcel



West Kitutu/Bogusero/2940 which is the same land being claimed in this case. From the material that I have concerning this case, I can see that the case was dismissed for non-attendance on 15 November 2010. There was however an application seeking reinstatement of the suit which was allowed in a ruling delivered on 28 February 2014. I see that on 29 January 2015 the applicants withdrew the suit and costs were awarded to the respondents. What happened thereafter is that the respondent filed a notice to show cause why the applicants should not be evicted. The prayers sought were granted on 10 March 2016 by the Deputy Registrar. The applicants were then evicted by Elimonyaco Auctioneers on 13 April 2018 but they came back to the land. The matter came up again before the Deputy Registrar on 27 August 2019 and she again allowed the eviction of the applicants. The 1st and 2nd applicants were also arrested for not paying the bill of costs in September 2019. They eventually paid the costs and were released on 3 October 2019. I have seen that there was another formal application dated 30 October 2019 that was filed by the respondent seeking for their eviction from the suit land. That application was opposed on the basis that the respondent did not have a counterclaim for eviction. The application was heard by Onyango J who delivered ruling on 27 January 2021. I see that in that ruling the judge was of opinion that the previous eviction carried out by Elimonyaco Auctioneers on 13 April 2018 was erroneous and she could not give another order for eviction because the respondent had not sought a prayer for vacant possession. It is after that ruling that the respondent filed a plaint seeking orders of eviction.

12. In his submissions, Mr. Momanyi, learned counsel for the applicants, urged the point that the eviction previously carried out was erroneous. It may have been erroneous but the order for eviction was indeed issued by the Deputy Registrar and executed before the applicants again came back to the land. What is important is that the respondent was not allowing the applicants any peaceful occupation of the land. He was defending the suit for adverse possession until its dismissal in 2012 and eventual withdrawal in 2015. He applied for warrants of eviction which he got and executed. These are actions that obliterate any peaceful occupation of the land by the plaintiffs. Their possession of the land was interrupted not just by their eviction but all the while that the case was pending. In other words if one has a pending case, seeking to repulse the registered proprietor from the land, the time that the case remains defended and pending cannot be counted as a period of peaceful occupation. If a possessor of land is fighting cases in court to assert possession of the land and those cases are opposed by the land owner, it cannot be said that the possessor is in any peaceful possession of the land. Even in their evidence, the applicants acknowledged that their possession of the land was not peaceful. Without peaceful possession, however long the possession may have been, one cannot succeed in a case for adverse possession.
13. In our case I do find that the claimants in the suit for adverse possession have not been in peaceful possession of the suit land for a continuous period of 12 years prior to them filing suit. In fact even before the suit Kisii HCCC No. 95 of 2004 (OS), the applicants had other suits being the suit of 1992 and 1999. They have never been in peaceful possession of the suit land. Their claim for adverse possession therefore fails.
14. Having failed in their case for adverse possession, I cannot decline to allow the case of the respondent who is the plaintiff in the suit Kisii ELC No. 10 of 2023. I allow it and issue a declaration that the land parcel West Kitutu/Bogusero/2940 belongs to Augustantino Obaigwa Nyakundi. I issue an order to the defendants in that suit, that is Thomas Ratemo Ongeri, Paul Ondigi Ongeri, and Charles Morira Ongeri, to give immediate vacant possession upon pronouncement of this judgment and if they do not do so the plaintiff as the successful party is at liberty to apply for their eviction. I also issue an order of permanent injunction restraining the defendants in the suit Kisii ELC No. 10 of 2023, that is Thomas Ratemo Ongeri, Paul Ondigi Ongeri, and Charles Morira Ongeri, and/or their servants/agents or any person acting under their claim to the land, from entering, being upon, cultivating,



erecting any structures, or in any other way interfering with the possession of the land parcel West Kitutu/Bogusero/2940.

15. The plaintiff in the suit Kisii ELC No. 10 of 2023, that is Augustantino Obaigwa Nyakundi will have costs of both suits.

16. Judgment accordingly.

DATED AND DELIVERED THIS 2ND DAY OF MAY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of:

Mr. Marita h/b for Mr. Momanyi Aunga for the applicants

Mr. Soire for the respondent

Court Assistant – David Ochieng'

