



**Ochogo v Agunda & another (Environment and Land Appeal
E023 of 2023) [2024] KEELC 5203 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E023 OF 2023
GMA ONGONDO, J
JULY 4, 2024**

BETWEEN

SOLOMON OCHOGO APPELLANT

AND

DORCAS AGUNDA 1ST RESPONDENT

PETER OKELLO ONYANGO 2ND RESPONDENT

*(An appeal from the judgment of Hon J S WESONGA, PM delivered
in Homa Bay CM EL Case number E015 of 2021 (OS) consolidated
with ELC case number E008 of 2021 delivered on 25th of April 2023)*

JUDGMENT

1. This appeal stemmed from the judgment of the learned trial magistrate, Hon J. S Wesonga, PM delivered on 25th April 2023 where she held thus;
 - a. A declaration that the 2nd defendant is the legal and registered owner of the suit property Kanyada/Kotieno/Katuma “A”/1390 (The suit land herein).
 - b. A declaration that the plaintiff is a trespasser on the suit land.
 - c. An injunction be and is hereby issued restraining the defendant, his employees, agents and or servants from trespassing and or interfering whatsoever with the suit land.
 - d. The plaintiff is ordered to vacate the land failure to, eviction shall be undertaken in accordance with Section 152B of the Land Act, 2016 (2012).
 - e. The defendants shall have the costs of the suit.



2. Being aggrieved at the impugned judgment, the appellant, Solomon Ochogo through Aluoch Odera and Nyauke Advocates, lodged the appeal by way of memorandum of appeal dated 28th April 2023 founded upon the following grounds;
- a. The court below effect in failing to note that, Land Case E 015 of 2020 was filed as amended originating summons on 19th January 2021 yet ELC E 006 of 2021 was filed on 29th January 2021 and as such, the suit by the 1st Respondent (I think meant 2nd respondent) was an afterthought.
 - b. The Court below failed to appreciate that the Title transferred to the 1st Respondent by the 2nd Respondent was defective as the same was transferred while the Plaintiff was living on the land.
 - c. The Court below failed to appreciate that the pleadings by the 1st Respondent were couched in seriously evasive manner as the same did not set the timelines when;
 - i. The 2nd Respondent acquired the land in question.
 - ii. When the 1st Respondent visited the land in question to know that the Appellant was residing on the land in question or not.
 - iii. When the 1st Respondent became aware of the existence of the Appellant on the suit parcel of land or not.
 - iv. When one Vitalis Oduor came to know of the existence of the Appellant in the suit parcel of land.
 - d. The Honourable Subordinate Court failed to consider the provisions of *Limitation of Actions Act* especially that a claim for land by the 1st and 2nd Respondent could only be brought within a given time but without specifics on time being pleaded, the Subordinate Court had no option of determining when the 2nd Respondents' rights that were transferred to him began to accrue.
 - e. The Honourable Subordinate Court ignored the pleadings on paragraph 7,8,9,10,11 and 12 of the 1st Respondent's Replying Affidavit dated 4th March 2021 to the (O.S) in ELC E 015 of 2022.
 - f. The Honourable Subordinate Court equally ignored the observations contained in the survey Report.
 - g. The Court ignored the evidence that the Appellant had stayed on the suit parcel for over 25 years without any other evidence to contradict the same. (see paragraph 1 of page 2 of the judgement).
 - h. The Honourable Court ignored that there was no evidence of the existence of land parcel No. 2016 as alleged in the judgment.
 - i. The court ignored the evidence of DW1 Peter Okello that he (DW1) had been visiting the land in question and that he had been seeing Mabati Houses thereon.
 - j. The Court below ignored that there was no evidence of boundary between the 'alleged' Plaintiffs' house stands and the buildings on the suit parcel of land.
 - k. The Court below failed to appreciate the Law on *Limitation of Actions Act* and adverse Possession.
 - l. The judgment in thus not justifiable.



3. So, the appellant is seeking the orders infra;
 - a. The entire judgment of the Subordinate Court be quashed and set aside and this Appeal be allowed.
 - b. Costs of the subordinate Court and of this Appeal be allowed.
4. The appeal was heard by way of written submissions pursuant to the Honourable court's directions of the court given on 27th November 2023.
5. By the submissions dated 12th March 2024, learned counsel for the appellant stated the background of the case including that the suit land was registered in the name of the 1st respondent and transferred to the 2nd respondent. That the trial court sent the Court Administrator, the Land Surveyor and Land Registrar to the suit land and filed a report in court in respect of its' boundary. That the respondent disputed the report and the court ordered for a second survey which was never carried out. That the trial court ignored the evidence on record inclusive of the report and reached a determination on matters not presented before her.
6. Moreover, counsel submitted that it was not controverted that the appellant has stayed on the suit land for over thirty years with the knowledge of the respondent. That the respondent did not know the limits of the suit land which prompted the court to order the visit to the same which resulted in the report thereof. Thus, it was submitted that the appellant proved adverse possession over the suit land and implored this court to allow the appeal.
7. Messrs Abok Odhiambo and Company Advocates learned counsel for the 1st and 2nd respondents filed submissions dated 20th May 2024 terming the appeal unmerited and urged the court to dismiss it with costs to the respondents. Counsel referred to the impugned judgment and this court's directions of 27th November 2023 which were complied with on 12th March 2024 when the appellant's counsel served the record of appeal which is not legible. That therefore, respondents' counsel had the only option of referring to the trial court's proceedings and judgment.
8. Further, counsel identified twinned issue for determination namely whether the appellant had proved adverse against the respondent over the suit land and whether the 2nd respondent has indefeasible title to the same. In discussing the issues, counsel stated that the evidence of the appellant/PW1 differed with that of PW2, Joram Alika which was in line with the testimony of DW1 who stated that the appellant does not stay on the suit land. That 2nd defendant has indefeasible title as per section 26 of the Land Registration Act 2016 (2012) and that time started running after registration of the suit land as disclosed in the impugned judgment. Counsel referred to section 78 of the Civil Procedure Act Chapter 21 Laws of Kenya, the case of Gabriel Mbui- v-Mukindia Maranya (1993) eKLR and the case of Wambugu- v-Njuguna (1983) KLR 172, to buttress the submissions.
9. It is important to note that the 2nd respondent sued the appellant by a plaint dated 26th January 2021 and filed on 29th January 2021 in Homa Bay CMC EL Case No. E006 of 2021 (The original suit herein) for;
 - a. A declaration that the suit land registered in the name of the appellant belongs to him.
 - b. An order of permanent injunction restraining the appellant, his agents, servants and or employees from interfering in any way and or alienating the suit land.
 - c. Eviction orders.
 - d. Cost of the suit and interest.



10. Similarly, on 19th January 2021, the appellant lodged an originating summons dated 21st October 2020 amended on 13th January 2021 in Homa Bay CMC Land Case No. E 015 of 2020 claiming adverse possession over the whole of the suit land against the respondents (The counter claim herein) for the orders thus;
 - a. The Honourable court be pleased to make a finding and final judgment that the appellant has acquired a portion containing by measurement 0.17 hectares, the suit land.
 - b. That the Honourable court thus be pleased to order that the whole of the suit land currently occupied by the appellant be registered into the names of the appellant.
 - c. That the cost of the originating summons be provided for in favour of the appellant.
11. By the proceedings of 21st April 2021 and the consent of learned counsel for the respective parties, the two suits were consolidated on 21st February 2022 when the trial court directed, inter alia;
 - a. “That the plaint dated 26th January 2021 in the original suit shall be deemed as plaint for purposes of consolidation with E 015 OF 2020.
 - b. The originating summons dated 13th January 2021(I think, meant an amended originating summons) in Homa Bay CMC Land case E015 of 2021 be deemed as counter-claim to the suit.
 - c. The reply to the originating summons dated 4th February 2022 be deemed as reply to the counter claim.”
12. The respondent was duly served for hearing of the consolidated matters fixed for 22nd September 2022. So, the suit was heard ex parte on the said date when the PW1 testified, inter alia, that he is in occupation of the suit land where he had erected semi-permanent buildings and that the 1st respondent who visited the land had not claimed that it belongs to her. In his evidence, he relied on certificate of official search in respect of the suit land (P Exhibit 2) and a report by Land Surveyor (P Exhibit 3b) as well as a report by Land Registrar (P Exhibit 3c) and other documents.
13. PW2 told the court that PW1 is his relative. That he lives around the home of PW1 who built on the suit land and lives thereon with family. That the suit land is approximately an acre in area. That the land has big trees, water bore hole and water kiosk
14. Following the consent of 3rd October 2022 by counsel for the respective parties, PW1 and PW2 were recalled for cross examination only on 17th October 2022. Moreover, the survey reports dated 27th September 2022 were admitted as part of record and be final expert report herein.
15. DW1 relied on his statement of 26th January 2021 as part of his evidence. Further, he referred to and produced search certificate and title deeds-D Exhibits 1a to 1c. He stated that he learnt that PW1 was staying on the suit land and that he had not given him permission to stay thereon hence, sought eviction and injunction against PW1.
16. It is trite law that this being a first appeal from the trial court, the jurisdiction of this court is to reconsider the evidence on record, assess the same and come to my own conclusions and inferences with caution; see *Watt-v-Thomas* (1971) 1 ALL ER 482 and *Kamau-v-Mungai and another* (2006) 1 KLR 150.
17. In that regard, the key issues for determination are captured as per the grounds of appeal which are hereby analyzed and compressed to whether;



- a. The appellant established his claim for adverse possession over the suit land to the requisite standards.
 - b. The respondent's title to the suit land is indefeasible.
 - c. Subject to issues (a) and (b) above, what orders can be granted to attain the ends of justice?
18. On the first ground, the amended originating summons treated as the counter claim herein, was lodged on 19th January 2021 while the original suit was filed on 29th January 2021. Pleading a counter claim and joinder of causes of action are provided for under Order 7 Rule 7 and Order 3 Rule 5 of the [Civil Procedure Rules 2010](#) (The Rules). The original suit and the counter claim were consolidated by consent of the parties as stated in paragraph 11 hereinabove for their convenient trial bearing in mind the discretion of the court under Order 3 Rule 8 of the Rules.
 19. On that account, it is trite law that a consent order can only be set aside on the same grounds as would justify the setting aside of a contract; see *Brooke Bond Liebeg (T) Mallya* (1975) KLR EA 266 and [Flora Wasike- v-Destimo Wamboko](#) (1988) KLR 429.
 20. Concerning the second ground, DW1 testified in examination in chief that the 1st respondent was registered as the owner of the suit land on 28th November 2014 as discerned in certificate of official search, title deeds and green card (DExhibits1 (a) (b) (c) and D Exhibit 2). Registration of the suit land in the name of the 1st respondent and the 2nd respondent was made on 28th November 2014 and 17th November 2020 respectively.
 21. The testimony of PW1 was that he erected two mabati structures on the suit land in 2009 and has been in uninterrupted possession and occupation of it over 20 years. The evidence of PW1 was fortified by PW2 who stated that PW1 stays together with his family in the permanent house on the suit land.
 22. No doubt, mere change of ownership does not interrupt adverse possession; see [Githu- v-Ndeete](#) (1984) KLR 776 and [Titus Ong'ang'a Nyachieo- v-Martin Okioma Nyauma & 3 others](#) (2017) eKLR.
 23. Regarding the third and fourth grounds, paragraphs 4 and 5 of the plaint in the original suit state that the 2nd respondent's sister who is the 1st respondent, acquired the suit land sometimes back. That the sister transferred the same to him as a gift. That the 2nd respondent took possession of the suit land and directed his brother in law, Vitalis Oduor to take charge of it. DW1 stated in examination in chief that he visited the suit land several times.
 24. In light of the present competing claims, the court is aware of sections 7, 13 and 38 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya alongside Orders 37 and 50 of the Rules on adverse possession and time. From the respondents' pleadings and evidence on record herein, the timelines of the 2nd respondent's acquisition of the suit land, discovery of the appellant's possession of it and the institution of the original suit, remain a puzzle.
 25. On that score, the respondents' acquisition of the suit land was not legal, formal and free from any encumbrances; see [Munyu Maina - v- Hiram Gathiba Maina](#) (2013) eKLR.
 26. Concerning the fifth ground, it is averred in paragraphs 7, 8, 9, 10,11 and 12 of the 1st respondent's replying affidavit sworn on 4th March 2021 to the counterclaim, inter alia, that in the year 2014, title deed in respect of the suit land was issued to the 2nd respondent and in the year 2021, he discovered that the appellant had erected a temporary structure thereon. It is pretty clear that Alice Okello and Oduor, wife of the 2nd respondent and brother in law respectively featured in the affidavit but the trial court didn't mention them in the judgment.



27. On the 6th and 10th grounds, the report by Tiberius Ndigwa, Land Registrar referred to the survey on the suit land and that there are permanent houses of the appellant on the same-P Exhibit 3 (c). Also, the report dated 26th April 2022 by Mr. James O. Atata for County Surveyor Homa Bay County shows the total acreage of the suit land (0.12 Ha) as well as that the appellant is in enjoyment of the land having constructed buildings and planted trees as per findings Nos. 3 and 5 therein –P Exhibit 3b.
28. Exhibits 3b and 3c which were admitted as final expert reports as disclosed in the proceedings of 3rd October 2022 and paragraph 14 hereinabove, were overlooked by the learned trial magistrate in the impugned judgment. Sections 18 and 19 of the *Land Registration Act*, 2016 (2012) as read with sections 48 to 54 of the *Evidence Act* Chapter 80 Laws of Kenya provide for opinion evidence and I am guided by the decision in the case of *Azzuri Ltd- v-Pink Properties Ltd* (2018) eKLR on the essence of such evidence. By P Exhibits 3b and 3c, the appellant is in exclusive possession and occupation of the suit land.
29. As regards the seventh ground, the trial court stated the appellant’s case in brief and that PW1 did not prove entry into the suit land 25 years ago. Under cross examination, PW1 stated that he built on the suit land where he has lived for over 20 years and that he did not know how the respondent acquired it. On his part, DW1 testified during cross examination that PW1 entered the suit land in the year 2016 and erected a mabati structure thereon. That he (DW1) owned the suit land by way of transfer since the year 2020. The testimony of PW1 affirmed that PW1 stays on the suit land having constructed a permanent house thereon.
- The appellant sought a declaration that he had acquired the whole of suit land by way of adverse possession. In *Wilson Kazungu Katana and 101 others- v-Salim Abdalla Bakshwein and another* (2015) eKLR, the Court of Appeal stated 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.
30. Evidently, the possession and occupation of the suit land by PW1 was without the permission of the respondents; See *Richard Wefwafwa Songoi - v- Ben Munyitwa Songoi* (2020) eKLR.
31. Indeed, the suit land is registered in the name of 2nd respondent as disclosed in P Exhibit 2 and D Exhibits 1a, 1b and 1c. PW1 is in exclusive continuous possession and occupation of it in excess of twelve years without the permission of the respondents who have been dispossessed thereby as revealed in the testimonies of PW1 and PW2 inclusive of P Exhibits 3 b and 3 c herein. The appellant proved the counter claim to the required standards as held in Katana case (supra) as opposed to the proof of the original suit.
32. In conclusion, the appellant’s claim is an overriding interest in respect of the respondents’ title over suit land as stipulated under section 28 (h) of the *Land Registration Act*, 2016 (2012). So, it is my considered view that the trial court’s finding cannot hold at law.
33. Thus, this appeal is merited. The original suit is hereby dismissed while the counter claim is allowed with costs in terms as stated in paragraphs 3 (a) and (b) and 10 (a) (b) and (c) hereinabove.



34. It must be noted that this judgment was not delivered on 18th June 2024 as scheduled because it was declared Judiciary National Day of Mourning following the demise of a member of the Judiciary Team and then the trial Judge was away on urgent official duties including training organized by the Kenya Judiciary Academy and requisite notice issued accordingly.

35. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 4TH DAY OF JULY 2024

G.M. A ONG'ONDO

JUDGE

Present;

- a. Ms. Aluoch Odera learned counsel for the appellant
- b. Mr. Frank Mulama learned counsel for the respondents
- c. Mr. T Luanga, court assistant

