



Nanjala (Suing on behalf of Joseph Onyango Ogalo) v Okada (Sued on behalf of John Oduku Balongo) (Environmental and Land Originating Summons E012 of 2022) [2024] KEELC 5899 (KLR) (17 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5899 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2022
BN OLAO, J
SEPTEMBER 17, 2024

BETWEEN

FELIX ONYANGO NANJALA (SUING ON BEHALF OF JOSEPH ONYANGO OGALO) PLAINTIFF

AND

ROSEMARY BARASA OKADA (SUED ON BEHALF OF JOHN ODUKU BALONGO) DEFENDANT

JUDGMENT

1. Felix Onyango Nanjala (the Plaintiff herein and suing as the legal representative of the Estate of Joseph Onyango Ogalo – now deceased) has approached this Court vide his Originating Summon dated 28th March 2022 in which he has impleaded Rosemary Barasa Okado (the Defendant herein and sued as the legal representative of John Oduku Balongo – also deceased). By that Originating Summons, the Plaintiff claims to be entitled to a portion of land measuring 3½ acres out of the land parcel No Bunyala/mudembi/1773 (the suit land).
2. The Plaintiff therefore seeks a determination of the following issues:
 - a. Whether the deceased Joseph Onyango Ogalo (hereinafter Ogalo) purchased 3½ acres of the land parcel No Bunyala/mudembi/1773.
 - b. Whether Ogalo was given vacant possession in 1979 and has been in peaceful quiet and uninterrupted occupation together with his family since then to-date for over 12 years.
 - c. Whether the interest of the Defendant in the said 3½ acres of land parcel No Bunyala/mudembi/1773 have been extinguished by operation of the law and she holds the same in trust on behalf of the Plaintiff.



- d. Whether the Plaintiff has acquired the said 3½ acres by operation of the law and he should be registered as the absolute owner.
 - e. Whether the Defendant should pay costs.
3. Arising out of the determination of the above issues, the Plaintiff seeks the following orders:
1. A declaration that the Plaintiff and or Ogalo has acquired and be registered absolute owner of 3½ acres out of the land parcel No Bunyala/mudembi/1773.
 2. The Defendant or in default the Deputy Registrar of this Court do sign and execute all the necessary documents to cause sub-division, transfer or registration of the said 3½ acres to the Plaintiff.
 3. The Defendant do pay costs.
4. The Originating Summons is supported by the Plaintiff's affidavit of even date in which the Plaintiff has deposed, inter alia, that he is the son and Administrator to the Estate of Ogalo while the Defendant is the daughter and Administratrix to the Estate of the deceased John Oduku Balongo (hereinafter Balongo). That in 1979 the said Balongo offered to sell to Ogalo a portion of land which later became the suit land. The offer was accepted and the two entered into a land sale agreement after which Ogalo took possession of the suit land. As at the time of the sale agreement, the suit land had not yet been registered as the adjudication process was in progress. However, Balongo curved the said 3½ acres which was later demarcated by elders and the surveyor. Since then, the Plaintiff and his family have used the land for farming and growing crops. Balongo did apply to the Land Control Board to sub-divide his land and register 3½ acres to Ogalo but recently, the Plaintiff discovered that the Defendant had commenced succession proceeding and so he filed an objection. The Defendant and his family have never utilized the suit land since 1979 and his rights therein have now been extinguished by operation of the law and she holds it in trust for the Plaintiff who is entitled to be registered as the proprietor thereof.
5. The following documents are annexed to the Originating Summons:
1. Copy of Limited Grant Ad Litem issued to the Plaintiff for purposes of filing this suit.
 2. Copy of Green Card for the land parcel No Bunyala/mudembi/1773.
 3. Copy of land sale agreement dated 29th April 1979.
 4. Acknowledgement slip for Kshs.1,500.
 5. Several photographs of a parcel of land showing a building, crops and trees.
 6. Copy of application by John Oduku Balongo to transfer the suit land to Joseph Onyango Ogalo.
 7. Letter of consent issued to John Oduku Balongo on 6th May 1993.
 8. Copy of Notice of Objection to the making of Grant in Busia Chief Magistrate's Court Succession Cause No E502 of 2021.
6. The Plaintiff also filed statements of his witnesses names Joseph Ouma (PW2) and Judith Anyango Were (PW3) both dated 28th March 2022. In their statements, both those witnesses confirm that they are neighbours to the Plaintiff and that in 1979 Ogalo purchased the suit land from Balongo and took



possession of the same. That neither Balongo nor his family or even the Defendant who is his daughter have used the said land measuring 3½ acres.

7. The record shows that the Defendant was served with the Originating Summons on 8th July 2022 at her home in Nayera village by a process server of this Court one Joseph Orata Kweyu. And although the firm of Omeri & Associates Advocates filed a Notice of Appointment to act on her behalf, no response nor any other pleadings were filed in opposition to the Originating Summons. And although this Court did direct that the Defendant be served for the hearing of the suit, there was no appearance by either counsel or the Defendant.
8. The hearing of the suit came up on 25th July 2024 and the Plaintiff testified and called his witnesses Joseph Ouma (PW2) and Judith Anyango Were (PW3) in support of his case. The Plaintiff adopted as his evidence the contents of his supporting affidavit while his witnesses also adopted as their evidence the contents of their statement which I have already summarized above. The Plaintiff also produced as his documentary evidence the documents annexed to his supporting affidavit and which I have also referred to above. At the end of the plenary hearing, the Plaintiff's counsel Mr Fwaya informed the Court that he would not be filing any submission.
9. I have considered the evidence by the Plaintiff and his witnesses as well as the documents filed.
10. As the Defendant did not file any response to the Originating Summons, the Plaintiff's suit stands unopposed. Nonetheless, the Court must consider the evidence on record to find out if the Plaintiff has met the threshold for proving a claim to the land by way of adverse possession.
11. I must however start by expressing my disappointment that counsel for the Plaintiff has filed two documents one being a land sale agreement and the other an acknowledgement slip both drafted in a local dialect. Luckily for the Court, I have been able to decipher both documents because the dialect is not very different from my own and both documents are very brief. However, this Court does not need to remind parties and their counsel that documents which are not in the language of the Court must have a certified translation into the English language which by dint of the provisions of Section 23 (1) of the *Environment and Land Court Act*, is English. It would be unfortunate for a party's claim to be lost because of lack of such a routine exercise as translation of documents. And although Article 7 of the 2010 Constitution provides that the official languages of the Republic of Kenya are Kiswahili and English, it has been held by superior Courts that "documents used in proceedings in the High Court must be translated into English." – *RAPHAEL LUKALE -V- ELIZABETH MAYABI & ANOTHER C.A. CIVIL APPEAL NO 286 of 2016* (NAIROBI) (2018 eKLR). I have however previously taken the view that where a document is in Kiswahili language or a language which the Court understands such document can be admitted in evidence - see *Mangara -v- Makanda KEELC 18555 KLR* and also *Simon Khaemba Mwanja (deceased) -V- Jamin Wasike Khaemba & Another 2020 eKLR*. However, since this suit was not defended, that discussion is now purely academic but worth repeating nonetheless.
12. Having said so, the Plaintiff having approached this Court for orders that he has acquired the suit land by way of adverse possession, the starting point must be Section 38 (1) of the Limitation of Action Act. It reads:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

It is now well established that the combined effect of the provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act* is to extinguish the title of the registered proprietor of land in favour of an



adverse possessor at the expiry of 12 years of the adverse possession Benjamin Kamau & Others -v- Gladys Njeri C.a. Civil Appeal No 213 of 1996.

13. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 I KLR 184, the Court of Appeal held:

“ And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition – *Wanje -v- Saikwa* (no 2) 1984 KLR 284”.

And as was reiterated by KNELLER J in the case of *Kimani Ruchine -v- Swift Rutherfords & Company Ltd* 1980 KLR 10;

“ The Plaintiffs have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

From the Plaintiff’s testimony which is not controverted, he and his family and before then their patriarch OGALO have been in occupation and possession of the 3½ acres of land comprised in the suit land since 1979. They have developed it as is clear from the photographs filed herein. That means that by the time this suit was filed on 13th April 2022, that occupation had been for 43 years well in excess of the 12 years provided for in order to qualify for the grant of the orders that the Plaintiff and his family have acquired it by way of adverse possession. The land is registered in the name of Balongo since 2nd October 1985 as per the Green Card and the Defendant who has been sued as his legal representative has not denied that indeed she holds that title of legal representative to the Estate of Balongo. A claim to land by way of adverse possession can be made in respect to an Estate of a deceased person – *Karuntimi Raiji -v- M’mkinya M’itunga* 2013 eKLR.

14. Guided by all the above, this Court is satisfied that the Plaintiff has established his claim to the suit land by way of adverse possession. However, since the Plaintiff is himself only the Administrator of the Estate of Ogalo, he will hold the title to the suit land in trust for the rest of the family of Ogalo.

15. This Court therefore makes the following disposal orders:

1. The Plaintiff’s claim to the 3½ acres comprised in the land parcel No Bunyala/mudembi/1773 by way of adverse possession is allowed.
2. The Plaintiff shall be registered as proprietor of the 3½ acres comprised in the land parcel No Bunyala/mudembi/1773 in trust for the family of Joseph Onyango Ogalo.
3. The Defendant shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel No Bunyala/mudembi/1773 and execute all the necessary documents to facilitate the registration of the said parcel of land in the name of the Plaintiff in trust for the family of Joseph Onyango Ogalo.
4. In default of (3) above, the Land Registrar Busia shall notwithstanding the absence of the original title proceed to cancel the name of Oduki Balongo from the register of the land parcel No Bunyala/mudembi/1773 and the Deputy Registrar of this Court shall execute all the relevant documents on behalf of the Defendant to facilitate the said registration.
5. No orders as to costs.

BOAZ N. OLAO

JUDGE



17TH SEPTEMBER 2024 JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 17TH DAY OF SEPTEMBER 2024.

Right of appeal.

BOAZ N. OLAO

JUDGE

17TH SEPTEMBER 2024

