



Oguda & another (Suing as the Legal Representatives of the Estate of Maricus Odero - Deceased) v Otieno (Sued as the Legal Representative of the Estate of Dismas Otieno Mikwaya - Deceased) (Environment and Land Appeal E013 of 2023) [2024] KEELC 6610 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E013 OF 2023**

**GMA ONGONDO, J
OCTOBER 8, 2024**

BETWEEN

**DAMARIS AKOTH OGUDA 1ST APPELLANT
MOSES OTIENO OREGO 2ND APPELLANT
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARICUS
ODERO - DECEASED**

AND

**ROBERT OOKO OTIENO RESPONDENT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DISMAS
OTIENO MIKWAYA - DECEASED**

*(An appeal arising from the judgment/decree in Ndhiwa Principal
Magistrate's Court Environment and Land Case No. E005
of 2022 by Hon. E. M. Onzere, PM on 6th September 2023)*

JUDGMENT

1. The instant appeal was ignited by the judgment of Honourable E. M. Onzere, PM delivered on 6th September 2023 where she held in part that the estate of Dismas Otieno Mikwaya (deceased 1) is entitled to six (6) acres of land number Kabuoch/Kobita/Kawuor/1482 (the suit land herein) by virtue of adverse possession. So, she directed the defendants/appellants to execute the transfer documents to have the said portion of the suit land transferred and registered in the name of deceased 1 within the next thirty (30) days, failure to which the Court Administrator Ndhiwa to sign the documents needed for the transfer to be effected.



2. Being aggrieved by the said determination, the appellant through M/S Onyango Owaka and Associates Advocates, mounted this appeal by way of a memorandum of appeal dated 12th September 2023 based on the grounds, inter alia;
 - a. The learned trial magistrate erred in fact and law by awarding the respondent 6 acres of the suit land yet the respondent's supportive documents indicate that they purchased a portion of that parcel measuring 1.6 Ha which is equivalent to 4 acres.
 - b. The learned trial magistrate erred in fact and by law by assuming matters of acres and hectares which is a matter of judicial notice.
 - c. The learned magistrate erred in law and fact by finding out inconsistencies in all the respondent's witnesses yet proceeding in her motive to judge in favor of inconsistent evidences from all the respondent's witnesses.
 - d. The learned magistrate erred in fact and law by assuming that the respondent has been occupying 6 acres of the suit land without any supporting documents such as survey report.
 - e. The trial magistrate manifested bias by totally ignoring the appellant's evidence and leaning in favour of the respondent whose documentary evidence such as sale agreement were found to be invalid and the witnesses having contradicted themselves totally in the whole trial.
 - f. The learned trial magistrate erred in law by presuming that the respondents have had exclusive and uninterrupted occupation of the 6 acres of the suit land in doing so disinheriting the other four members of the appellant's family.
3. Thus, the appellant prayed for the orders infra:
 - a. That the appeal be allowed and judgment of the trial court be set aside.
 - b. Costs of the appeal be awarded to the appellants.
4. The appeal was heard by way of written submissions pursuant to the court's directions of 22nd May 2024.
5. By the submissions dated 16th July 2024, the appellants' counsel submitted that the sale agreement produced by the respondent in evidence indicated that his father purchased 1.6 Ha which is the equivalent of 4 acres hence, the trial court erred in awarding the respondent's family 6 acres of the suit land as opposed to 4 acres thereof. That the testimonies of the respondent's witnesses contradicted each other, yet the trial court still found in favour of the respondent.
6. On the other hand, learned counsel for the respondent, Quinter Adoyo and Company Advocates, filed submissions dated 13th June 2024 and identified three issues for determination to wit:
 - i. Whether the respondent is entitled to 6 acres of the suit land by virtue of adverse possession?
 - ii. Whether the appeal should be dismissed? and
 - iii. Who bears the costs of the appeal?
7. Briefly, counsel submitted that the respondent has been in continuous, notorious and uninterrupted possession of the disputed portion of the suit land since 1982 to date. That therefore, he has acquired 6 acres thereof by way of adverse possession. Thus, she urged the court to dismiss the instant appeal with costs. To buttress the submissions, counsel referred to the case of Mbira vs Gachuhi (2002) IEALR 137.



8. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
9. At the trial court, the respondent instituted the suit by way of a plaint dated 25th May 2022 seeking the orders infra:
 - a. An order compelling the appellants to execute and/or sign all the transfer instruments to facilitate transfer and registration of 6.0 acres of the suit land in the name of the respondent and in default, the Executive Officer of this humble court be at liberty to execute the transfer instruments in favour of the respondent.
 - b. Failure to and in the alternative, an order be issued declaring that the respondent is entitled to the suit property by way of adverse possession, having been in continuous, notorious and uninterrupted possession since the year 1982.
 - c. Costs of this suit and interest at court rate from the time of filing until payment in full.
10. PW1, Robert Otieno, relied on his statement on record as well a copy of death certificate of deceased 1, copy of letters ad litem, copies of national Identification Cards, a copy of the official search certificate for the suit land, a copy of the sale agreement dated 12th February 2016, a copy of letter dated 16th February 2016 and a copy of the grant (PE Exhibits 1 to 7 respectively) as part of his evidence. In cross-examination, he implored the court to direct the appellant to transfer a portion of the suit land measuring 4 acres to him.
11. PW2, Alex Otieno Otieno, relied on his statement filed on 2nd November 2022 and stated that his family started cultivating the suit land in 1973 and have been living thereon since 1982. That he stays on the suit land to date, together with his mothers and siblings. That the suit land is vast and they are only claiming 6 acres thereof. On cross-examination, he clarified that he was born in 1974. That the suit land was purchased by his grandmother (deceased) and not his late father, deceased 1 herein.
12. Leonida Auma Otieno (PW3) relied on her statement filed on 2nd November 2022. She stated that the disputed portion of the suit land was purchased by her mother in law. That she is the 4th widow to deceased 1, whose remains are interred on the disputed portion. In cross-examination, she averred that Dismas owned 6 acres of the suit land but admitted that she did not know how the said Dismas acquired the same.
13. Anastasia Angwen Otieno (PW4) and the 3rd widow to deceased 1, testified that her mother-in-law, Ann Aduro, purchased 6 acres out of the suit land from one Joseph Origa in 1974. That the family settled thereon in 1980.
14. The appellants opposed the claim vide their joint statement of defence dated 21st June 2022. They prayed that the same be struck out and/or dismissed with costs.
15. DW1, Damaris Akoth Oguda, relied on her statement filed on 23rd November 2022, which was adopted as part of her evidence. She stated that the suit land is registered in the name of her late uncle, Maricus Odero (deceased 2). That the respondent did not raise any objection when she carried out succession in respect to the estate of deceased 2. That the respondent is not entitled to 6 acres of the suit land. During cross-examination, DW1 conceded that they were willing to give to the respondent the portion of the suit land that their father showed them belonged to the respondent.
16. In the foregone, the issues for determination are as set out on the grounds of appeal which crystallize to:



- a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
17. It is noteworthy that the learned trial magistrate set out the parties' respective cases, identified four issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment was in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
18. In the impugned judgment, the learned trial magistrate noted that the suit land originally belonged to deceased 2. She noted the inconsistencies in the testimonies of PW1 to PW4 with regards to the sale agreement (PExhibit 5) and observed, inter alia;
- “...Any action done as regards the land before a full grant was obtained amounts to intermeddling with the deceased's property and as such is considered to be null and void. The purported agreement entered into on 12th February 2016 is null and void and cannot be enforced by way of specific performance...”
19. Moreover, the trial court noted that:
- “...It is evident that the family of deceased 1 have been in occupation of the land from 1980s. They have set up their homesteads on the land. Their occupation of the land has been open, continuous and notorious. Their occupation of the land was uninterrupted. They are entitled to a portion of the land by virtue of adverse possession...”
20. I have examined the sale agreement dated 12th February 2016 and produced in evidence as PExhibit 5. I note that the same purports to dispose of an interest in land which belongs to deceased 2. At the time of execution, the alleged sellers, Victor Odhiambo Oguda and Moses Otieno Orego, had not yet obtained a grant to the estate of deceased 2, the registered proprietor thereof.
21. It is trite law that without a confirmed grant, a party does not have the capacity to enter into a binding agreement for the sale of immovable property of a deceased person; see Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) eKLR and Section 82 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya.
22. Section 45 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya provides that the authority to handle the assets of a deceased person emanates from grants of representation to the estate of such deceased; see also Kothari –vs- Quareh (1967) EA 364. Therefore, the said agreement is null, void and unenforceable in the circumstances.
23. Besides, the Court of Appeal noted in the case of Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another (2015) eKLR, that adverse possession dictates that;
- 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.
24. On the first dictate, the suit land was initially registered in the name of deceased 2, whose estate is being administered by the appellants herein. This is evidenced by a copy of the certificate of official search



- dated 24th May 2021 and produced as PExhibit 4. Also, DW1 stated that she has obtained a title deed for the entire suit land, registered in the name of deceased 2 following succession in respect to the estate of deceased 2.
25. As regards the second and third dictates, it is not in dispute that the respondent and his family have been in open and exclusive possession of a portion of the suit land for a period exceeding 12 years. PW1, PW2, PW3 and PW4 testified that they have lived on the suit land for a period in excess of 12 years.
26. I also note that the appellant conceded that deceased 1 and his wives are buried on the suit land. That the family of deceased 1 is entitled to a portion thereof.
27. Also, DW1 stated in cross-examination that:
- “...Dismas and his wives were buried on the land since we were told there was a portion of land they were to get. Our father told us Dismas is entitled to a portion of the land...”
28. The appellants contend that the learned magistrate erred in fact and law by assuming that the respondent has been occupying 6 acres of the suit land without any supporting documents such as Surveyor’s report. On that score, it is important to note that the respondent’s claim was for part of the suit land measuring approximately six acres in area, a definite portion of land as held in *Muthuita –vs- Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
29. It is trite law that evidence of occupation such as cultivation should be definite as to area and time; see *West Bank Estates Ltd. -vs- Arthur* (1966) 3 WLR 750. In the present case, PW2, PW3 and PW4, testified that they have been in occupation of a portion of the suit land measuring 6 acres in area, for a period exceeding 12 years. PW2 stated in part thus:
- “...I have lived on the land since 1982...The land was vast and we were only claiming 6 acres of the land...”
30. PW3 testified that: “...I was married to deceased 1 in 1990. I found deceased 1 had already constructed a house on the land in dispute... I pray that the court gives us our 6 acres out of the land...”
31. Similarly, PW4 averred whilst giving her evidence-in-chief that:
- “...since I got married in 1980, we have been staying on the land...” During cross-examination she stated that; “...we had 6 acres of the land...”
32. The testimony of PW1 was that although he was told that his father purchased 6 acres of the suit land, he was claiming 4 acres thereof as indicated in the sale agreement (PExhibit 5). Having found that PExhibit 5 was null, void and unenforceable and taking into account the testimonies of PW2 to PW4, it is my considered view that the trial court was justified in awarding the respondent 6 acres out of the suit land, the same having been acquired by way of adverse possession.
33. Therefore, I find no reason to dislodge the decision of the trial court. I proceed to uphold it in entirety.
34. To that end, the instant appeal originated by way of a memorandum of appeal dated 12th September 2023 is devoid of merit. The same is hereby dismissed with costs to the respondent.
35. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF OCTOBER 2024

G. M. A ONGONDO



JUDGE

Present

Ms. Ogallo, Learned Counsel for the appellant

Mr. Jack Otieno holding brief for Quinter Adoyo, Learned Counsel for the respondent

T. Luanga, Court Assistant

