



**Nyamula v Ochogo (Environment and Land Appeal E031 of 2022)  
[2023] KEELC 16100 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16100 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E031 OF 2022  
GMA ONGONDO, J  
MARCH 14, 2023**

**BETWEEN**

**WILFRED OGUNDA NYAMULA ..... APPELLANT**

**AND**

**SAMWEL ODERO OCHOGO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E. M. Onzere, Principal Magistrate, delivered on 28th July, 2022 in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 22 of 2021.)*

**JUDGMENT**

1. The instant appeal arose from the trial court's judgment delivered on the July 28, 2022 by the Honourable E. M. Onzere, Principal Magistrate, in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 22 of 2021 where the learned trial magistrate held, inter alia;
  - a. That the plaintiff is declared the owner of 2.5 acres of land parcel number Kanyamwa/K/K/Kakaeta/5 (the suit land herein) by adverse possession.
  - b. That the defendant is hereby ordered to execute all the necessary documents for the transfer of a portion measuring 2.5 acres of the suit land in the name of the plaintiff within thirty (30) days of service of this order upon him.
  - c. If the defendant fails to comply with Order (b) above, the Court Administrator Ndhiwa Law Courts is hereby ordered to execute all the appropriate documents necessary to effect the transfer of 2.5 acres of the suit land to the plaintiff.



- d. Since the plaintiff's case partly succeeded, each party shall bear its own costs of the suit.
2. Being aggrieved by the said judgment, the appellant namely Wilfred Ogunda Nyamula through the firm of H. O. Mimba and Company Advocates mounted the appeal by way of a memorandum of appeal dated August 19, 2022 and duly filed on even date. The Appeal is anchored on grounds 1 to 5 as set out on the face thereof and these include:
  - a. The learned trial magistrate erred in law by holding that the appellant had adverse possession to the suit land (portion sold to him) but failed to order the respondent to open to him the access road that he had used over the years that was closed in the year 2021.
  - b. The learned trial magistrate erred in law by holding that the appellant was only entitled to 2 ½ acres of the suit land by way of adverse possession whereas the portion occupied and used by him over the years was 4 acres.
  - c. The learned trial magistrate erred in law by delivering a judgment that failed to consider that the sale of land in respect to the suit land was drafted by laymen and not legal experts hence cannot meet the legal requirements for sale of land agreement.
  - d. The learned trial magistrate erred in law by delivering to the respondent relief not sought.
3. Wherefore, the appellant has sought the orders that the judgment of the trial court:
  - a. Be set aside and/or varied to grant him the suit land 4 acres that he has since acquired by way of adverse possession.
  - b. That the respondent be ordered to open to him access road he has since acquired use of adversely and the County Surveyor be ordered to amend the area map accordingly.
  - c. Costs of the appeal be provided.
4. The appeal was heard by way of written submissions pursuant to this court's directions of November 15, 2022.
5. Accordingly, the appellant's counsel filed submissions dated February 14, 2023 on even date. Counsel submitted that the appellant acquired 4 acres of the suit land and not 2 ½ acres thereof. Counsel prayed that the court restores the access road to the appellant's land. Thus, counsel urged the court to allow the appeal in its entirety.
6. Everline Kuke and Company Advocates, learned counsel for the respondent, filed submissions dated February 14, 2023 on even date and identified one issue for determination to wit: whether the applicant acquired the suit land by adverse possession. Counsel submitted that the respondent herein possesses an indefeasible title to the suit land pursuant to the provisions of sections 24 and 26 of the [Land Registration Act](#), 2016 (2012), having acquired title to the same through a lawful process. That since the appellant was occupying the suit land with the consent of the respondent, he did not meet the threshold for acquisition of title by way of adverse possession as laid down in the case of [Samuel Kihamba v Mary Mbaisi](#) (2015) eKLR.



7. Counsel further stated that the two sale agreements dated that were produced at the trial court as PExhibit 5 and PExhibit 5(a) were contradictory as they referred to different parcels of land. That the appellant did not produce any document or map to prove that an access road was part of the land sold to him. Thus, counsel submitted that the instant appeal lacks merit and should be dismissed with costs. Counsel relied on the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein & another* (2015) eKLR, to fortify the submissions.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
  - a. Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
  - b. Depending on the outcome in (a) above, what final orders can this court make to meet the ends of justice?
9. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to consider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co Ltd and others* (1968) EA 123 and *Williamson Diamonds Ltd v Brown* (1970) EA 1.
10. It must be noted that the suit was commenced by way of originating summons dated June 23, 2021 and filed in court on June 29, 2021 by the plaintiff (appellant herein) seeking the following orders;
  - a. That the honourable court be pleased to make a finding and final judgment that the applicant has acquired a portion containing by measurement 4 acres of the suit land adversely.
  - b. That the honourable court be pleased to order that the said portion of the suit land measuring 4 acres currently occupied by the applicant be registered in his names.
  - c. That costs of this originating summons be provided for.
11. PW1, Wilfred Ogunda Nyamula, who was the plaintiff before the trial court, relied on his statements filed in court on diverse dates as part of his evidence. He testified that in 1984 and 1985, he bought 2.5 and 1.5 acres respectively from Dismas Osodo Ondieki (the deceased) but transfer of the same was not effected to him. That upon the demise of the deceased, the respondent herein initiated succession proceedings and caused the suit land to be transferred to himself.
12. Further, PW1 stated that the respondent threatened to evict him and blocked the 6 metres access road. He produced in evidence a copy of search certificate for the suit land, a copy of demand letter dated February 1, 2005, a copy of letter dated June 3, 2021, sale agreement dated September 2, 1984, a copy of land sale agreement filed on June 29, 2021, original land sale agreement (PExhibits 1, 2, 3, 4, 5(a) and 5(b) respectively.)
13. PW2, Doris Matenga Ogunda, adopted her statement filed on February 9, 2022 as part of her evidence. It was her testimony that the deceased sold a piece of land to the appellant herein. During cross-examination, PW2 stated that conflicts arose following the demise of the deceased. She prayed that the 6 metres access road be opened, although she did not produce a map showing that the said access road ought to be on the suit land.



14. PW3, Paul Otieno Nyamula, stated that initially, the deceased sold to the appellant 2.5 acres of land then added him 1.5 acres. That the first sale agreement was between the appellant and the said the deceased whilst the 2<sup>nd</sup> sale agreement was entered into in 1985 after the demise of the deceased between the appellant herein and one Susana Osodo.
15. On July 13, 2021, the defendant filed a replying affidavit sworn on July 9, 2021 denying the claims in the originating summons. He averred that he is the sole proprietor of the suit land, having acquired the same after carrying out succession in the estate of the deceased. He stated that the plaintiff is illegally in possession of a portion of the suit land. He also denied the existence of an access road in the suit land and averred that the plaintiff has not been in peaceful and uninterrupted occupation of the suit land as they have had disputes before the Chief, the District Officer and demand notices issued to the plaintiff to vacate the suit land.
16. The defendant (DW1) who is the respondent herein testified on March 25, 2022 and adopted his replying affidavit sworn on July 9, 2021 as part of his evidence. He reiterated the averments in his replying affidavit and noted that the plaintiff had produced two contradictory agreements purportedly for the sale of a portion of the suit land.
17. During cross-examination, DW1 admitted that when the original owner of the suit land (the deceased) died, the plaintiff was already cultivating a portion of the suit land. That when he filed the succession cause, the plaintiff was in occupation of the said portion. Further, he stated that the plaintiff has never been sued for trespass. That the plaintiff has been in occupation of the portion thereof for a period exceeding 12 years.
18. It is important to note that the learned trial magistrate stated the parties' respective cases, delineated four issues for determination, discussed them and reached her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
19. In arriving at the impugned judgment, the learned trial magistrate observed that the agreement for sale dated 2<sup>nd</sup> September 1984 for 2.5 acres of the suit land met the conditions for a valid land sale agreement. The learned trial magistrate noted at page 3 of the judgment thus:

“...The agreement is in writing, it describes the parties and the land parcel and it is duly executed by the parties and the signatures have been witnessed...”
20. On the other hand, the trial magistrate held that the sale agreement dated September 4, 1985 for an additional portion of 1.5 acres of the suit land was invalid as the details in the copy contradicted those in the original agreement. Thus, the trial court held that the plaintiff had acquired by adverse possession a portion of the suit land measuring approximately 2.5 acres in area as he had been in open, notorious and continuous occupation of the portion thereof for a period exceeding 12 years.
21. On the issue of an access road, the court held that:

“...no map has been produced to show that an access road ought to pass through the land. The court cannot order a road to be opened on a parcel of land unless there is proof that there is a provision for a road to pass through the land...”
22. The appellant contends that the learned trial magistrate erred in law by holding that the appellant had adverse possession to the suit land (portion sold to him) but failed to order the respondent to open to him the 6 metres access road that he had used over the years and that was closed in the year 2021. PW2 also urged the court to compel the respondent herein to open the said access road.



23. In cross-examination at the trial court, the defendant admitted that when he fenced off his land using sisal plants, it stopped the appellant from passing through the land. He contended that the appellant was using a neighbour's road to access his portion of the suit land, adding that if there was peace between himself and the appellant, he would have agreed that an access road be opened.
24. Indeed, the appellant did not avail a map of the area indicating that an access road ought to be on the suit land. I therefore, endorse the trial magistrate's holding that a court cannot order a road to be opened on a parcel of land unless there is proof that there is a provision for a road to pass through the land. However, the parties are encouraged to resolve the issue of an access road through alternative dispute resolution mechanism in line with the provisions of article 159 (2) (c) and (3) of the Constitution of Kenya, 2010.
25. The appellant lamented that the learned trial magistrate erred in law by holding that he was only entitled to 2½ acres of the suit land by way of adverse possession whereas the portion occupied and used by him over the years was 4 acres. At paragraph 6 of the replying affidavit on record, the defendant stated that the portion of the suit land occupied by the appellant measures approximately 4 acres in area. However, during cross-examination, the defendant contradicted himself by stating that he was not aware that the appellant occupies 4 acres as no surveyor had visited the suit land to take measurements hence, he was unreliable in the circumstances.
26. Furthermore, I note that the validity of the second sale agreement dated 4<sup>th</sup> September 1985 for a portion of the suit land measuring 1.5 acres was contested. As correctly observed by the trial court, the same had inconsistencies.
27. The appellant further stated that the learned trial magistrate erred in law by delivering a judgment that failed to consider that the sale of land in respect to the suit land was drafted by laymen and not legal experts hence cannot meet the legal requirements for sale of land agreement. Interestingly, it is on the basis of the sale agreement dated 2<sup>nd</sup> September 1984 that the court held that the appellant was entitled to a portion of the suit land measuring 2.5 acres in area by way of adverse possession. Is the appellant implying that he is not entitled to such portion of the suit land?
28. This court is aware of the legal framework in section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. Notably, the sale of land agreement dated September 2, 1984 (PExhibit 4) is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness. Hence, the said agreement meets the conditions for a valid sale of land agreement as stipulated in section 3(3) (*supra*).
29. The appellant avers that the learned trial magistrate erred in law by delivering to the respondent relief not sought. This court subscribes to the decision in *Odd Jobs –vs- Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. The said decision was followed by the Court of Appeal in the case of *Vyas Industries v Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
30. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of sections 107 to 109 of the Evidence Act, Chapter 80 Laws of Kenya.
31. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, did the appellant prove to the requisite standard, his case before the trial court?



32. Having taken into account the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above, the appellant who was the plaintiff before the trial court proved that he is only entitled to a portion of the suit land measuring 2.5 acres in area. Evidently, he acquired the same by way of adverse possession. I therefore, would endorse the learned trial magistrate's holding.
33. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I proceed to uphold the same.
34. Wherefore, the instant appeal originated by way of a memorandum of appeal dated August 19, 2022 and duly filed on even date, be and is hereby dismissed.
35. By dint of the proviso to section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of this appeal to be borne by the appellant.
36. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 14<sup>TH</sup> DAY OF MARCH 2023.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Mr. Okemwa instructed by Mr. Amodi, learned counsel for the Respondent
2. Edith and Mutiva- Court Assistants

