



**Ondari v Obuogi (Environment & Land Case 37 of 2021)
[2023] KEELC 15814 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 37 OF 2021**

AY KOROSS, J

MARCH 2, 2023

BETWEEN

SIPROSA ACHIENG ONDARI PLAINTIFF

AND

JOSIAH OKUMU OBUOGI DEFENDANT

JUDGMENT

Background

1. The plaintiff, defendant and some of their respective witnesses have been the subject of protracted dispute over land parcel No.Siaya/Agulu/100 ('suit property'). Prior to this suit, the parties or some of their witnesses had sued each other in various ELC cases, criminal proceedings had been instituted and an alternative justice system mechanism had also been put in motion. This court will set out their respective backgrounds.
2. The plaintiff, together one Margaret Adhiambo Ochieng (DW1) allegedly instituted suit against the defendant and James Odhiambo Owinyo (DW3) in Bondo PM ELC No.70B of 2018 for having acquired the suit property illegally. I have used the word 'alleged' because by an affidavit dated 3/04/2019 and filed in that particular suit, DWI denounced those pleadings for being fraudulent. She filed a notice of withdrawal of suit.
3. Pursuant to Article 159(2) (c), parties in this suit on 23/05/2019 pursued an alternative justice system mechanism. It was acceded the defendant would relinquish a small portion of the suit property to the plaintiff to the exclusion of her family members.
4. Shortly thereafter, the defendant instituted suit against the plaintiff in Bondo PM ELC 56 of 2019 for trespass and damages.



5. Wilfred Ochieng Ombayi (PW3) who is the plaintiff's in law trespassed on the suit property and he was convicted in Bondo PM Criminal Case no. 07 of 2020.
6. Instead of filing a defence or defence and counterclaim in Bondo PM ELC 56 of 2019 as the case could be, the plaintiff instituted this suit by on originating summons dated 23/12/2019 in which she raised several issues for determination which can be summarised as follows;
 - a. Whether the defendant was the proprietor of the suit property;
 - b. Whether she was an adverse possessor;
 - c. Whether a declaration should be made the defendant held the suit property in trust for her;
 - d. Whether an order should issue for the Land Registrar, Bondo to register the suit property in her name; and
 - e. Who should bear the costs of the suit.
7. She sought the following reliefs; a declaration the defendant's title to the suit property was extinguished and, the defendant's title be revoked and be registered in her name.
8. The originating summons was accompanied by the plaintiff's supporting affidavit and several documents.
9. In opposition, the defendant filed a replying affidavit dated 6/02/2020 and a defence and counterclaim dated 12/09/2020 in which he sought orders of eviction, permanent injunction and costs of the suit together with interests.
10. By an order dated 5/03/2020, Bondo PM ELC 56 of 2019 was transferred to this court. The suit proceeded by viva voce evidence.

Plaintiff's evidence

11. The plaintiff testified as PW1 and she relied on her witness statement dated 7/12/2020 and produced several documents. Her evidence was led by Joshua Richard Ochieng and Wilfred Ochieng Ombayi who respectively testified as PW2 and PW3. In a similar fashion, they adopted their respective witness statements dated 30/3/2022 and 7/12/2022 as their evidence in chief.
12. The assertions made in the plaintiff's witness statement was that she had lived on the suit property for 39 years and her entry thereof was by marriage to Charles Ondar Oriewa (deceased and hereafter 'Charles'). Her mother in law Martina Odhiambo (deceased and hereafter 'Martina') entered the suit property with her children including Charles with the consent of the 1st registered owner; Henry Odimo Osire (deceased and hereafter 'Henry'. Henry sold it in 1993 to Nelson Ochieng Gombe (deceased and hereafter 'Nelson') with the understanding he would not interfere with Martina's family's occupancy. She occupied one acre.
13. On cross examination, she testified her larger family lived on parcel no. Got Agulu/103 which belonged to PW3; it was adjacent to the suit property. Charles had lived in Got Agulu/103 but he was buried on the suit property. Nelson had never cultivated the suit property. The elders in the alternative justice system had ordered her son to move back to Got Agulu/103. In 2018, a land registrar fixed the boundary between the suit property and Got Agulu/103. The suit property had several homes including those of the defendant's brothers. In re-examination, she testified she had never lived in Got Agulu/103.



14. PW2, a former assistant chief testified he witnessed the agreement of sale over the suit property between the defendant and DW3 and trees demarcated the purchased portion from the plaintiff's homestead.
15. In cross examination, he testified at the date of the agreement, the suit property was vacant and the plaintiff lived on a separate parcel of land. The plaintiff's family's land and the suit property adjoined each other.
16. He testified at the time of the agreement, the plaintiff's homestead was on Got Agulu/103 and the defendant's agreement of sale was on the entire suit property.
17. PW3, largely corroborated PW1's evidence in chief. In addition, he testified DW3 transferred the suit property to himself using a fraudulent confirmation of grant. He and his family reside in Got Agulu/103. He did not recall when the plaintiff entered the suit property.
18. On cross examination, he testified the plaintiff entered the suit property in 1970's. Issues over the suit property arose after a site visit by a land registrar.

Defendant's evidence

19. The defendant testified as DW2 and he relied on his witness statement dated 7/12/2020 and produced several documents. His evidence was led by Margaret Odhiambo Ochieng and James Odhiambo Owinyo who respectively testified as DW1 and DW3 respectively. DW2 relied on his witness statement dated 1/09/2020 and replying affidavit dated 6/6/2020. DW3 adopted his witness statement dated 9/08/2021.
20. DW1 relied on her affidavit dated 3/04/2019 filed in Bondo PM ELC No.70B of 2018. It was her evidence the plaintiff instituted fraudulent proceedings in her (DW1's) name in Bondo PM ELC No.70B of 2018; those pleadings were full of falsehoods. Nelson purchased land parcel no. 1224 from Henry. The suit property had erroneously been registered in Nelson's name; she had no interest in it.
21. On cross examination, she testified Nelson was deceased and she was not aware of the plaintiff's occupancy over the suit property.
22. It was DW2's testimony, he purchased the suit property in 2011 from DW3 and his brother's homestead was on it. He had acquired good title. He became privy the plaintiff had encroached on the suit property in February 2018 when a government surveyor sought to establish the boundaries between the suit property and Got Agulu/103 and therefore, her claim of adverse possession could not suffice. Despite the alternative justice system decision, the plaintiff constructed a house for her son on the suit property.
23. On cross examination, he testified he did not know how the suit property was transferred to DW3 from Nelson's name. The plaintiff moved to her current home in 1997 from Got Agulu/103 after the demise of Charles. Trees which had separated the suit property and Got Agulu/103 were uprooted by his family.
24. On re-examination, he testified Got Agulu/104 was his family land. A road partially ran parallel through the suit property, Got Agulu/103 and Got Agulu/104. These parcels of land converged at one point.
25. DW3 mainly corroborated DW1 and DW2's evidence.
26. On cross examination, he testified the plaintiff entered the suit property in 1990. The plaintiff's house was partly on the suit property and on Got Agulu/103. There were no trees demarcating the suit property from Got Agulu/103.



Plaintiff’s written submissions

27. The plaintiff’s counsel, Mr. Odera, filed his written submissions dated 10/12/2022. Counsel identified three issues for determination (i) whether the plaintiff had met the threshold of adverse possession (ii) whether the plaintiff was entitled to 1 acre of the suit property and, (iii) what of costs.

28. On the 1st issue, counsel submitted the doctrine of adverse possession was anchored on Sections 7, 13 and 38 of the Limitation of Actions Act. These provisions provide as follows;

‘7. Actions to recover land
An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

Section 13 reads;

‘13. Right of action not to accrue or continue unless adverse possession
(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
(2)
(3)’

Lastly, Section 38 provides thus;

‘38. Registration of title to land or easement acquired under Act
(1) 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 in a lease registered 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.’

29. Counsel submitted the plaintiff had proved she was in possession because she had a house on the suit property and had planted trees thereon. Further, the act of the plaintiff occupying the suit property demonstrated she had dispossessed the owner. Counsel argued the plaintiff had met the ingredients of adverse possession and to this end, he relied on several authorities including *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR where the Court of Appeal held;

‘Adverse possession is a fact to be observed upon the land. It is not to be seen in a title...’

And Samuel Kihamba v Mary Mbaisi [2015] eKLR where the Court of Appeal laid down the principles of adverse position as follows: -

‘Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.’

30. On the 2nd issue, counsel argued notwithstanding the court was unable to identify the portion occupied by the plaintiff, it was undisputed the plaintiff occupied an identifiable portion measuring one acre which had previously been demarcated by trees. Counsel relied on Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR where the Court of Appeal stated;

‘The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776.’

Defendant’s written submissions

31. The defendant’s counsel, Mr. Nyanga, filed his written submissions dated 20/01/2023. Further to the plaintiff’s issues, he added one issue; whether the defendant was entitled to the prayers sought in the counterclaim.
32. On the 1st and 2nd issues of whether the plaintiff had met the threshold of adverse possession and entitled to a portion thereof, counsel cited the same provisions of law and authorities as the plaintiff’s counsel and this court need not rehash them. Counsel argued the plaintiff encroached on the suit property and it was evident there had been many suits over it and time stopped running when the defendant filed Bondo PM ELC 56 of 2019. Counsel submitted the plaintiff had not proved her case. In addition to similar authorities as the plaintiff’s counsel, he placed reliance on the Court of Appeal decision of Sisto Wambugu v Kamau Njuguna [1983] eKLR where the court stated: -

‘Lindley MR in Littledale v Liverpool College [1900] 1 Ch 19, 21 put it in these words:

“In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it ...”’

33. On the 3rd issue of reliefs sought in the counterclaim, counsel submitted the defendant was prima facie the registered owner of the suit property and was protected by Section 24 of the *Land registration Act*. Further by Section 26 of the same Act, the defendant’s title document could only be challenged if his title document was acquired fraudulently, improperly, illegally, unprocedurally or through a corrupt scheme. Counsel implored this court to dismiss the plaintiff’s case and allow the counterclaim. Counsel sought for costs of the suit and counterclaim.

Analysis and determination

34. I have considered the evidence on record including documents produced by parties in support of their respective cases as well as submissions. Being guided by the provisions of law and judicial precedents which have been well articulated in counsels’ submissions, I shall now proceed to consider the merits



or otherwise of the plaintiff's claim and defendant's counterclaim. The issues falling for determination are:

- I. Whether the plaintiff proved her claim of adverse possession to the required standards;
- II. If answer to (I) is in the negative, whether the plaintiff was a trespasser and orders of eviction and permanent injunction should ensue.
- III. What about costs.

I. Whether the plaintiff proved her claim of adverse possession to the required standards

35. Section 28 (h) of the [Land Registration ACT](#) recognises all registered land are subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.
36. I am in concurrence with the provisions of law and decisions cited by counsels which are binding on this court. From the evidence adduced, it was common ground inter alia, the dispute between the parties had been seething since 2018; the suit property was registered in the defendant's name; the defendant had bought the suit property from DW3; the suit property was at one time registered in Nelson's name; the plaintiff's house and that of the defendant's brother stood on the suit property and, in 2018, a land registrar fixed the boundaries between the suit property and Got Agulu/103.
37. When dealing with claims of adverse possession, the primary function of the court is to draw legal inferences from proved facts and such inferences are clearly matters of law. I will now proceed to juxtapose the facts of this case to the established legal framework.
38. The mere presence of the plaintiff's house on the suit property was not sufficient to deem her an adverse possessor. She was required to prove she had met the ingredients of adverse possession as set down in statutory provisions and settled legal principles. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal set down the issues a claimant must address when seeking to be deemed an adverse possessor;

'A person who claims adverse possession must inter alia show: (a) on what date he came into possession. (b) what was the nature of his possession? (c) whether the fact of his possession was known to the other party. (d) for how long his possession has continued and (e) that the possession was open and undisturbed for the requisite 12 years.'
39. The pleadings filed by the plaintiff in various courts including her evidence before this court were inconsistent. In Bondo PM ELC No.70B of 2018, it was her statement she had occupied the suit property for 40 years after Nelson, who had bought it from Henry, yielded it to her. In her affidavit in support of her originating summons, she asserted she had lived on the suit property for 40 years and she entered the suit property together with her in laws with the consent of Henry. To an extent, this tallied with her oral testimony.
40. Her witness statement to this suit stated she entered the suit property in 1980 but prior to that, Martina and Charles entered it in 1978 with permission of Henry and when Nelson bought it, he was to cede a portion to her family.
41. On cross examination, she contradicted herself. She testified Charles lived in Got Agulu/103 and she was uncertain if she changed homes from Got Agulu/103 to the suit property prior or after the demise of Charles. PW3 testified the plaintiff and other inlaws entered the suit property in 1970's. The



defendant and his witnesses were consistent on how the defendant purchased the suit property and transferred it to his name.

42. Who allowed the plaintiff to enter the suit property? Was it Nelson or Henry? Did Charles live in Got Agulu/103 before entering the suit property or did he come from Urima village as alleged? When did she and her family enter the suit property? Did she enter the suit property with Charles and Martina or did she enter the suit property after her marriage to Charles? What were the circumstances of her family's entry to the suit property? From the evidence adduced, this court was unable to decipher the date of entry for purposes of computation of time or determine the nature of the plaintiff's possession of the suit property. The plaintiff was unable to demonstrate how Henry or his subsequent heirs in title had been dispossessed of it or had discontinued their possession. The evidence on record left a lot to be desired. The plaintiff's testimony was untruthful, inconsistent and full of falsehoods.
43. It was evident she was not in exclusive occupation and possession of the suit property. In addition, despite her counsel submitting she was entitled to one acre, she did not specifically identify or describe the portion, size and location of the one acre from the larger suit property in her pleadings. This was in contradiction to her pleadings where she sought for the entire suit property. See *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015].
44. It was common ground the land registrar fixed the boundaries as envisaged by Section 19 of the [Land Registration Act](#) between the suit property and Got Agulu/103.
45. It would appear it was this process which established the plaintiff's house was on the suit property and not on Got Agulu/103. I say so because PW2 testified that at the time the defendant was buying the suit property, it was vacant. PW3 testified the plaintiff had never moved homes. In her affidavit, the plaintiff averred the defendant's brother had cleared a boundary separating the suit property and other parcels. In her oral testimony, she testified the decision of the alternative justice system ordered her son to move back to Got Agulu/103.
46. Being a boundary dispute, it ensues both parties were not aware the plaintiff was in occupation of the suit property until after the boundary between the suit property and Got Agulu/103 was established and fixed. It is the considered view of this court it was never the intention of the plaintiff to take over possession of the suit property. See *Samuel Kihamba v Mary Mbaisi* (Supra).
47. The boundary dispute may elucidate why the plaintiff was at pains to explain how she entered the suit property; she had encroached it. It confounds this court that instead of accepting the olive branch extended by the defendant for her residence to remain on the suit property, she instituted several disputes against him and other people. It is my finding the action of filing this suit after the defendant had filed Bondo PM ELC 56 of 2019 against her an abuse of court process.
48. Having evaluated the adduced evidence and also considered the applicable law, I find that the plaintiff did not prove her case on a balance of probabilities to enable this court declare she had acquired title to the suit property by virtue of being in adverse possession.

II. Whether the plaintiff was a trespasser and orders of eviction and permanent injunction should ensue

49. Having dismissed the plaintiff's claim of adverse possession, it follows the plaintiff had trespassed on the suit property. It is also my finding the plaintiff was a trespasser.
50. Parties are bound by their pleadings and because the defendant did not seek general damages, I shall not award it to him.



51. Having established the plaintiff was a trespasser, the defendant is entitled to the reliefs of permanent injunction and eviction against the plaintiff.
52. Before I issue my disposal orders, I must address the issue of illegality and fraud which were pleaded by the plaintiff. Though the plaintiff pleaded the defendant had acquired the suit property illegally and fraudulently, she did not particularize fraud. See Order 2 Rule 10(1) of the Civil Procedure Rules and *Elijah Kipng'eno Arap Bii v KCB & Another* Civil Appeal Number 276 of 2018. However, it is not lost to this court the manner in which the suit property was transferred from Nelson to DW3 raises questions.
53. It is my ultimate finding the plaintiff did not prove her case against the defendant and I hereby dismiss the plaintiff's suit. It is my finding the defendant proved his counterclaim against the plaintiff and his counterclaim is allowed. It is trite law costs follow the event and in the absence of special circumstances, I award costs of the suit and counterclaim to the defendant which shall be borne by the plaintiff. I issue the following disposal orders;
- a. The plaintiff is hereby granted 90 days from the date of service of the orders of this court to remove herself and her developments from land parcel no. Siaya/Agulu/100 and give the defendant vacant possession and in default, the defendant shall forcefully evict the plaintiff together with her servants or agents.
 - b. A permanent injunction be and is hereby issued restraining the plaintiff, her servants, agents and workers from entering or occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no. Siaya/Agulu/100.
 - c. Bondo PM ELC 56 of 2019 be remitted to Bondo Law Courts.
 - d. The costs of the suit and counterclaim are payable by the plaintiff to the defendant.
54. For the avoidance of doubt herein, eviction of the plaintiff from the suit property shall be undertaken in accordance with Sections 152 B, 152E, 152F, 152G, 152H, and 152 I of the [Land Act](#).
55. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of :

Mr. Okello for the plaintiff

Mr. Nyanga for the defendant

