



**Ondiegi v Adina & 3 others (Environment and Land Appeal
10 of 2022) [2023] KEELC 19310 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 10 OF 2022**

MN KULLOW, J

JULY 3, 2023

BETWEEN

PETER GUNDO ONDIEGI APPELLANT

AND

**TOBIAS ONYANGO ADINA (SUED IN THEIR CAPACITIES AS
ADMINISTRATORS OF THE ESTATE OF MICHAEL ADINA MAGADI -
DECEASED) 1ST RESPONDENT**

JOSEPH OPIYO ADINA 2ND RESPONDENT

RICHARD KIDINGA 3RD RESPONDENT

ENOS KEBEYA 4TH RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. M. Obiero delivered on April 7, 2022 in Migori CMC ELC No. 43 of 2021, in which the Plaintiff's claim against the defendants was dismissed with costs to the defendants. The grounds in the Memorandum of Appeal dated 08/04/2022 are that: -
 - i. The Learned Trial Magistrate erred in law and fact by failing to appreciate that this suit was brought against the 1st and 2nd defendants in their capacities as administrators of the estate of Michael Adina Magadi (deceased) who was registered as owner of the suit herein on August 29, 1994.
 - ii. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.
 - iii. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the period from 1994 to 2021 when the suit was filed is over 12 years.



- iv. The Learned Magistrate erred in law and fact by failing to appreciate that the appellant has been in occupation without interruption, openly, peacefully and notoriously for over 53 years.
 - v. That as a result, the Learned Trial Magistrate erred and dismissed the Appellant's case with costs to the Respondents.
2. Consequently, the appellant sought the following orders against the respondents: -
- a. That the Appeal herein be allowed
 - b. That the order dismissing the appellant's case be set aside
 - c. That judgment be entered for the appellant as prayed in the plaint with costs both in the lower court and high court.
 - d. Any other order that the honourable court may deem fit and just to grant.
3. A brief background to bring this matter into perspective is that the plaintiff/ appellant instituted a suit vide a Plaint dated July 22, 2021 against the defendants jointly and severally seeking an order that a portion measuring 100ft * 170ft be excised from the suit land and be registered in the name of the plaintiff, that the restriction registered against the suit land be removed and costs of the suit. It was his claim that he purchased the portion of the suit land in dispute sometimes between January 1, 1968 and April 20, 1970 from one Ismael Omenda, whereupon he took immediate vacant possession and has been developing the same.
4. That the said land was subdivided in the year 1973 by the said Ismael Omenda and the portion he occupies is No. Suna East/Kakrao/1945, was registered in the name of the Michael Adina Magadi, who is since deceased and is the 1st and 2nd defendants' father. Further, in the year 2012, the 3rd and 4th Defendants registered a restriction against the title of the suit land hence the instant suit, despite him having been in possession of the said land for over 53 years.
5. The suit was defended. The 1st and 2nd defendants filed a Joint Statement of Defense dated 11.11.2021 and erroneously referred to a witness statement. It was their contention that they were not parties to the purported sale and further that the late Ismael Omenda was not appearing on the Green Card. It was their claim that they have been holding the title of the suit land since 5/12/2012 to date and hence the issue of adverse possession as raised by the plaintiff does not arise and maintained that they have been in occupation of the land and are cultivating the same.
6. The 3rd and 4th defendants/respondents also filed a Joint Statement of Defense dated October 18, 2021. It was their contention that they have never sold any portion of their father's land to the plaintiff but confirmed that they registered a restriction against the suit land to prevent the same from being sold to 3rd parties without their consent.
7. By consent, parties agreed to canvas the Appeal by way of written submissions, to be filed and exchanged within 14 days. Both the appellant and the respondents filed their rival submission which I have read and taken into consideration in arriving at my decision.

Appellants' Submissions

8. The appellant's counsel submitted on the grounds in the Memorandum of Appeal separately. On the first ground, it was his submission that 1st & 2nd defendant were sued in their capacities as administrators of the estate of the late Michael Adina Magadi. However, at paragraph 38 of his submissions, he



- conceded that the 1st and 2nd defendants were not the duly appointed administrators of the estate of the late but that they had only filed an Application seeking to revoke the Grant.
9. That the plaintiff entered the suit land in the year 1969 whereas the registered owner of the suit land died in the in the year 1960. It was therefore his contention that the appellant had been in occupation of the land in an inconsistent manner with the estate of the deceased for 31 years before the 3rd defendant acquired a grant in respect to the land in the year 2000.
 10. He thus maintained that a claim of adverse possession can be raised in respect of an estate of a deceased person and owing to the appellant's occupation of the suit land for over 50 years, which has been open, exclusive, peaceful, and uninterrupted has met the requirements of an adverse possessor. He relied on the case of *Peter Gichuki Wanjobi v Julia Mumbi Muturi* Nyeri ELC Case No. 211 of 2013 in support his position.
 11. On the capacity of the respondents to be sued; it was counsel's submission that the 3rd Respondent is the legal representative of the estate of the deceased, having been issued with a Grant in August 2000. He conceded that the 1st and 2nd respondents did not have any Grant but that they presented themselves as heirs to the estate of the deceased and are therefore potential legal representatives of the estate of the deceased. However, he maintained that the appellant had proved to be an adverse possessor against the said estate and therefore it is not fatal that the 1st and 2nd Respondents were sued despite not being the legal administrators of the said estate.
 12. It was further counsel's submission that the mere change of ownership of the suit land from the name of the deceased to that of the 1st and 2nd Respondents did not interrupt the Appellant's occupation and claim under Adverse Possession and he cited the decision in the case of *Leonola Nerima Karani v William Wanyama Ndege* [2012] eKLR.

1st and 2nd Respondent's Submissions

13. Counsel for the 1st and 2nd respondent submitted on 4 issues; whether the appellant was entitled to a portion of the suit land, whether the claim of adverse possession was sought in the Pleint and whether he is entitled to the reliefs sought in the Appeal.
14. It was counsel's submission that the ownership and occupation claims by the appellant by virtue of adverse possession were not supported by any evidence before the trial court, no evidence of either a picture of the home, mutation or surveyor's report was adduced to support the said claims of occupation of more than 53 years. To the contrary, he submitted that the 1st and 2nd respondents produced a copy of the title deed of the suit land as Dexh. 4, which showed that the suit land was transferred in the name of Michael Adina Magadi on 29/8/1994 and later to the 1st and 2nd Respondents by way of transmission on 5/12/2012.
15. On whether the appellant is entitled to the reliefs sought in the Memorandum of Appeal; it was his submission that the appellant's claim was for a portion measuring 100ft * 170ft while from the copy of the sale agreement which she relied on the portion allegedly sold measured 50ft * 170ft. He maintained that the appellant was originally anchored on contract executed between himself and the late Ishmael Omenda but he has later introduced the issue of adverse possession. Further, that the contract was in respect of parcel No. Suna East/ Kakrao/ 386 and not Suna East/ Kakrao/1945 as alleged. That the Record confirmed that parcel No. 386 was subdivided into 3 portions; No. 1943, 1944 and 1945 and the Appellant did not adduce any evidence to show that the portion he claims fell under parcel No. 1945 as alleged.



16. It was counsel's contention that from the body of the Plaint, the prayers sought are for the enforcement of the contract dated 18/1/1969. In addition, it was his claim that the 1st and 2nd Respondents were registered as proprietors of the suit land on 2/12/2011 as shown in Dexh. 5 and thus, at the time of filing the suit, 12 years had not lapsed to enable the Appellant claim adverse possession.
17. That the documents produced by the 1st and 2nd Respondents as Dexh. 1 - 5, to wit, copy of the Title Deed as Dexh. 1, copy of confirmation of grant as Dexh. 2, copy of Grant as Dexh. 3, Application of consent of Land Control Board as Dexh. 4 and a copy of the Green Card as Dexh. 5, contradicted the appellant's documents produced as PExhibits 1 – 7. He thus urged the court to dismiss the Appeal with costs.

3rd and 4th Respondent's Submissions

18. The 3rd and 4th Respondents acting in person, submitted on the ground in the memorandum of appeal generally. It was their submission that the Appellant did not distinguish his interest in parcel No. 1945 arising out of the subdivision of parcel No. 386.
19. They further submitted that the Appellant did not prove his claim against them in the trial court and that the issue of adverse possession cannot be raised against them and further that the same was not proved in the trial court. They thus urged the court to dismiss the Appeal with costs.
20. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the sole issue for determination is:-
 - i. whether Appeal is merited and the Appellant is entitled to the reliefs sought.
21. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The Court of Appeal's in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as that: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
22. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the judgment in order to ascertain whether the trial magistrate rightly exercised his discretion in allowing the Plaintiff's claim against the Defendants. The main issue before the trial court was on the ownership of the suit land.
23. The appellant on the one hand contended that he is the rightful owner of a portion of the suit land pursuant to a Sale Agreement dated 1/1/1969 and 1973 between himself and one Ishmael Omenda and sought to be registered as the proprietor thereof.
24. The 1st and 2nd respondents on the other hand maintained that they are the rightful owners of the suit land, the same having been registered in their names in the year 2011 by virtue of transmission. That their deceased father became the registered owner of the said land in the year 1994. They therefore dismissed the claims of ownership made by the Appellant. The 3rd and 4th Respondents also denied the allegations made against them and maintained that they have been wrongfully sued.



25. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

26. From a re-evaluation of the evidence adduced at the trial court, the various pleadings and testimonies of the parties together with their witnesses in court; I find that the Appellant did not adduce any evidence whatsoever in support of his allegations.

27. Further, I have noted from the Memorandum of Appeal that the appellant’s claim is largely based on the doctrine of Adverse Possession. However, on a critical review of the pleadings in the trial court and the orders sought therein together with the judgment appealed against; I do note that the issue of adverse possession was neither pleaded in the Plaintiff nor determined on merit in the judgment of the trial court.

28. The prayers sought in the Plaintiff of registration of a portion of the suit land measuring 100ft * 170ft in his name and the removal of the restriction, are both hinged on the agreement for sale between himself and the late Ishmael Omenda. It is therefore evident that the appellant in the trial court sought specific performance of the said contract, he did not seek a declaration of ownership by virtue of adverse possession. To this end, it is clear that the appellant is introducing a new issue at the appellate stage herein. I wish to reiterate that parties are bound by their pleadings.

29. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in dismissing the plaintiff’s claim. The analysis was purely made upon evaluation of the full facts of the case together with the documents and evidence adduced in support of each party’s claim. I find no reason to interfere with the same.

Conclusion

30. In conclusion, I accordingly find that the Appeal is not merited and the Memorandum of Appeal dated April 8, 2022 is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 3RD DAY OF JULY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No Appearance for Appellants

No Appearance for Respondent

Court Assistant - Tom Maurice/ Victor

