



Mbori & another v Oria (Being a legal representative of the Estate of the Late Chrysanthus Onyuka-Deceased) (Environment & Land Case 35 of 2021) [2023] KEELC 20630 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 35 OF 2021
GMA ONGONDO, J
OCTOBER 3, 2023**

BETWEEN

JOSIAH OUMA MBORI 1ST PLAINTIFF

SAMUEL OUKO MBORI 2ND PLAINTIFF

AND

EDWARD ODHIAMBO ORIA (BEING A LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHRYSANTHUS ONYUKA-DECEASED) DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit revolves around a portion of land measuring an area of approximately 120 feet by 120 feet in all the property known as title number West Kasipul/Kasimba/474 (The suit land herein) and the same is located within Homa Bay County.
2. The two plaintiffs are represented by the firm of Gordon Ogola, Kipkoech and Company Advocates while the respondent is represented by the firm of Ojienda and Company Advocates.
3. Initially, this suit was lodged at Migori Environment and Land Court. On 6th October, 2021, it was transferred to this court for hearing and determination bearing in mind access to justice as enshrined under Articles 6 (3) and 48 of *the Constitution* of Kenya, 2010.
4. Pursuant to Order 37 Rule 19 of the *Civil Procedure Rules*, 2010, the court directed that the Originating Summons dated 8th October 2019 and the replying affidavit thereto be treated as a plaint and a statement of defence respectively. That hearing of the suit be by way of viva voce evidence.



B. The Gist Of The Plaintiffs' Case

5. The plaintiffs commenced this suit by way of the originating summons seeking the following orders;
 - a. That a declaration be and is hereby issued that the estate of the late Chrysantus Onyuka (Deceased) holds the suit land.
 - b. That in the alternative, the plaintiffs have become entitled by adverse possession to the suit land.
 - c. That the Deputy Registrar of the Honourable Court does execute all necessary documents to facilitate registration of the Plaintiffs as the proprietors of the suit land.
 - d. An order directing the Migori District (Homa Bay in the context herein) Land Registrar to rectify the title by cancelling the registration of Chrysantus Onyuka as the proprietor of the suit land and substituting Chrysantus Onyuka with the plaintiffs.
 - e. Costs of the suit be awarded to the plaintiffs.
6. The originating summons is premised on grounds 1 to 5 stated on the face of the same as well as supporting affidavit of the 1st plaintiff and with the authority of the 2nd plaintiff as well as copies of documents marked as "J001 to JOO5" annexed to the affidavit. The said documents are; copies of sale of land agreement between the plaintiffs and the deceased, certificate of official search, photographs of building materials, citation and petition together with Gazette Notice (P Exhibits 1 to 5 respectively).
7. Briefly, the plaintiffs' claim that they purchased the suit land, a sub division of the parent land, LR No. West Kasipul/Kasimba/348 from the deceased in the year 1985. That thereafter, the deceased marked the boundaries of the suit land and the plaintiffs took immediate possession of the same. That the plaintiffs erected a permanent building which is incomplete thereon and cultivate the land to date. That the deceased died on 4th April 1990 and the suit land has not been transferred to the plaintiffs hence precipitating this suit.
8. One Charles Odhiambo Okoth (PW1) relied on his affidavit in support of the originating summons as part of his evidence. He stated in part that he is a neighbor to the defendant and that he resides on 0.2 hectares of the suit land which the plaintiffs bought from the Deceased and that there is an ongoing building thereon. That there was a mutual understanding between the plaintiffs and himself to cultivate land adjacent to the suit land.
9. PW2, the 1st plaintiff relied on his affidavit for and behalf of the 2nd plaintiff and himself in support of the originating summons alongside P Exhibits 1 to 5 as part of his evidence. He testified, inter alia, that he paid consideration for the suit land which he bought from the deceased and that he lives thereon.
10. By the submissions dated 4th May 2023 and filed on 24th May 2023, learned counsel for the plaintiff set out brief facts of the case including that the plaintiffs purchased from the deceased, the suit land to be excised from the parent land. That the same has not been transferred to the plaintiffs as the seller died. Counsel delineated and analyzed twinned issue for determination namely constructive trust and adverse possession in favour of the plaintiffs. To buttress the submissions, counsel relied upon *Stead-vs-Steadman* (1976) AC 536, 540, *Willy Kimutai Kitilit-vs-Michael Kibet* (2018) eKLR, *Macharia Mwangi Maina & 87 others-vs-Davidson Mwangi* (2014) eKLR and *Peter Mbiri Michuki-vs-Samuel Mugo Michuki* (2014) eKLR, among other authoritative pronouncements.



C. The Defendant's Case In Summary

11. In his replying affidavit sworn on 28th January 2022 with copies of annexed documents marked as "EOO-1 to EOO2" (Infra), the defendant stated, inter alia, that whereas the suit land belonged to the deceased who died on 4th April 1990, he had no knowledge of sale of the same to the plaintiffs. That this suit is overtaken by events thus against section 4 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya and that there has been no transfer or transmission of the suit land to anybody.
12. As part of his evidence, the defendant (DW1) relied the said replying affidavit and the annexed documents marked as "E00-1" (title deed to the suit land) and "E00-2" (letter of administration) and a copy of certificate of official search dated 18th January 2021(D Exhibits 1 to 3 respectively) and his statement of even date. He told the court that PW1 bought the suit land from the deceased in 1986 and that ten years later, the deceased passed on, among other things.
13. The parties' respective submissions as regards the preliminary objections dated 22nd October 2019 and 15th June 2022, to some extent, touch on the issues for determination at this stage of suit. Nonetheless, the said objections were duly determined on 27th February 2020 and 14th November 2022 respectively.

D. Issues For Discussion

14. Order 15 of the *Civil Procedure Rules*, 2010 provides for framing of issues and materials from which issues may be framed in a matter. Moreover, it is trite that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Company Limited -versus Falcon Guards Limited* (2000) 2 EA 385.
15. The plaintiffs' counsel filed a list of issues dated 20th July 2020. The same contains six issues including whether the plaintiffs have acquired title to the suit land by adverse possession and whether they are entitled to reliefs sought in the originating summons.
16. In the foregone, the issues for determination herein crystalize to whether the plaintiffs have established;
 - a. Their claim in respect of trust and adverse possession over the suit land against the defendant.
 - b. That they are entitled to the orders sought in the originating summons.

E. Discussion And Determination

17. Concerning the first issue, in Black's Law Dictionary 10th Edition at page 1740, the term "Trust" means;

"The right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."
18. Trust being an equitable right is enshrined in Article 10 (2) (b) of the *Constitution* of Kenya, 2010. It is a question of fact to be proved by evidence; see *Wambugu vs Kimani* (1992) 2 KAR 58 and *Macharia Mwangi Maina and Kitilit* cases (supra)
19. Notably, all registered land shall be subject to overriding interests including customary trusts as stipulated in section 28 (b) of the *Land Registration Act*, 2016 (2012). It is pretty clear that these interests are invisible on the register as noted in the said legal provision and as reinforced by the case of *Isack M'Inanga Kiebia-vs-Isaaya Theuri M'Lintari and another* (2018) eKLR.



20. Moreover, it must be remembered that the essentials of customary trust are well settled; see Isack Kiebia case (*supra*).
21. Under cross examination, PW1 told the court thus-
- The deceased was sickly, suffering from cancer at the time we bought the suit land.....He died four years later.I bought the suit land. I have lived thereon as stated at paragraph 15 of my supporting affidavit.....”
22. In examination in chief, DW1 stated, inter alia-
- “I know PW1 herein. He bought a piece of land namely LR No. West Kasipul/Kasimba/474 from my father, Chrystantus Onyuka (Deceased) in 1986.....Ten years later, my father was deceased...”.
23. In common ground that during his lifetime, the deceased sold the suit land to the plaintiffs who paid the purchase price thereof. The plaintiffs then took possession of it but the deceased failed to transfer the land to them. In the circumstances, constructive trust over the suit land applies against the defendant in favour of the plaintiffs as recognized in Article 10 (2) of *the Constitution* of Kenya, 2010, Macharia Mwangi Maina and Kitilit cases (*supra*)
24. As regards adverse possession, I subscribe to the Court of Appeal decision in the case of [*Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another*](#) (2015) KLR that;
- a.
-Section 13 (1) however, provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession). Tied to this, is section 7 of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years.....”
25. The Court proceeded to unveil what amounts to adverse possession thus;
- a. The parcel of land 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 have been 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.
26. It is essential that the adverse possession should be of the whole or a defined portion of land; see [*Gatimu Kinguru-vs-Muya Katangi*](#) (1976-80) 1 KLR 317.
27. In the present case, the suit land is approximately 1.55 hectares in area as it is discerned in PExhibits 1, 2, DExhibit 1 which also reveal that it was registered in the name of the Deceased with effect from 5th April 1988. Title deed was issued on 7th November 1991 accordingly.
28. Further, the said registration was made under sections 27 and 28 of the Registered [*Land Act*](#) (Cap 300- the Repealed Act) as shown in PExhibits 1, 2 and DExhibit 1; see also *Wainaina-vs Murai and others* (1976-80)1KLR 383 at 289 and 290.



29. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others* (2017).
30. In the case of *Wanyoike Gathure-vs-Beverly* (1965) EA 514, 518, Miles J held that in adverse possession, there must be an unbroken possession of the land in question by the applicant. That there should be no endeavor to interrupt it.
31. The plaintiffs asserted that they bought the suit land from the deceased and are in exclusive uninterrupted possession of it as discerned in the testimonies of PW1 and PW2. PExhibit 3 tells it all.
32. Furthermore, during cross examination, DW1 stated as follows;

“the family of my father had not taken any action on the suit land.....”
33. In the case of *Salim-vs-Boyd* 1971 EA 550, it was noted that rights and registrations of land can be challenged on grounds of adverse possession. It flows from the evidence of record including P Exhibit 3 that there has been ouster of the defendant from the suit land via adverse possession, cultivation, occupation and development; see *Gatimu Kinguru* case (*supra*).
34. It is therefore, the finding of this court that the plaintiffs have proved their case for constructive trust and adverse possession over the suit land against the defendant on a balance of probabilities as noted in *Salim* case (*supra*).
35. Thus, judgment is hereby entered for the plaintiffs against the defendant in terms of orders 1, 2, 3, 4 and 5 sought in the originating summons and as stated in paragraph 5 (a) (b) (c) (d) and (e). hereinabove.
36. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 3RD DAY OF OCTOBER 2023

G. M. A ONG'ONDO

JUDGE

