



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ooko v Mbugua & another (Environment and Land Case Civil Suit  
E034 of 2021) [2023] KEELC 21338 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E034 OF 2021  
AA OMOLLO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**ALBERT OKOTH OOKO ..... PLAINTIFF**

**AND**

**MOSES MBUGUA ..... 1<sup>ST</sup> DEFENDANT**

**LOICE NDUTA MBUGUA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the Defendants *vide* Plaint dated 3<sup>rd</sup> February 2021 seeking for the following orders;
  - a. A declaration that the plaintiff is the rightful owner of suit parcel of land known as LR. No.27/13 situated at Ridgeways Kasarani, within Nairobi together with the developments thereon.
  - b. An order that the suit parcel of land known as LR, No.27/13 be registered in the name of the plaintiff as the rightful owner by way of adverse possession.
  - c. A permanent injunction restraining the defendants, their servants, agents, employees, assigns and/or representatives from entering, evicting and/or interfering with the Plaintiff's quiet possession or enjoyment of the suit parcel of land known as LR. No.27/B situated at Ridgeways Kasarani, within Nairobi or otherwise interfering therewith in any manner whatsoever and the orders of this court be supervised by the OCS Kasarani Police Station.
  - d. Costs and incidentals of this suit and
  - e. Any other relief that this Honorable Court may deem appropriate to award.



2. The Plaintiff averred that he is the licensee, legal occupier, beneficial and rightful owner of the suit parcel of land known as LR. No,27/13 situated at Ridgeways Kasarani, within Nairobi herein after referred to as “the suit property”. He stated that he was initially a squatter among residents of Roysambu, Kasarani up to the year 2000 when the then Provincial Administration had powers to give land and allocated him together with others suit parcel of land known as LR, No.27/13 situated at Ridgeways Kasarani.
3. The Plaintiff averred that he claims the suit property through adverse possession having lived on the same for an uninterrupted period of over twelve (12) years as required by the law and was in the process of acquiring registration of the same but the Defendants went to the ground to harass him with the intention to dispossess him. Also, that the Defendants have tried to use their influence both in the local council and Ardhi House, to manipulate records so that their names are inserted as the rightful owners of the plot but to no avail.
4. The Plaintiff particularised the Defendants’ malice stating that he is the rightful allottee and they are unlawfully evicting him by denying him access to the suit property, threatening to develop the plot without his consent, demolish his structures and threatening him to sell the same and share the proceeds. The Plaintiff further averred that there is civil case No. 3966 of 2019 which he intends to withdraw for having been filed at the Chief Magistrates Commercial Courts, Nairobi between him and the defendants over the same subject matter.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their statement of defence dated 21<sup>st</sup> October 2022.They denied that the Plaintiff was allocated the said land reference Number 27/13 situated in Ridgeways Kasarani by the Provincial Administration.They contended that they are the landlady/lord of the suit property having the authority from the legal and bonafide owners of the property to develop and put up structures for rental purposes.
6. The Defendants added that the Plaintiff has been a tenant in the suit property together with other eleven tenants who are still in occupation since 2003 until sometime in August, 2021 when he was issued with a notice to vacate the premises for breach of their tenancy agreement by putting up illegal structures.

## **Evidence**

7. The oral hearing commenced on... and the Plaintiff testified relying on his sole evidence. As PW1, he stated that he had been staying on the suit property without interruption since 2003 and had temporary houses. He stated that he tried to fence the area in 2019 but the 1<sup>st</sup> Defendant resisted. PW1 asserted that he took out a search at the Ministry of Lands in the year 2019 but there were no results showing the owner. He thus applied to be registered as the owner and to prove his registration, he produced an original of agreement/indenture dated 26<sup>th</sup> November 1970 which was registered on 17<sup>th</sup> November 2020.
8. PW1 continued in evidence that the Defendants were his neighbours and that there were other people living in the suit property. He stated that he was paying a fee to the 2<sup>nd</sup> Defendant before being issued with a notice to vacate. PW1 admitted that he did not know that the suit property was registered in 1979 and that the search by the Defendant bears the name of Samuel Mbugua and Grace Muthoni. He also averred that the suit land was transferred to him by his brother Alexander Odhiambo in the year 2003 and the fee he was paying was for maintenance. He confirmed that the suit property is approximately 20.1 acres but his claim is limited to 3 Ha; and that the sub division of the suit property has not been done.



9. The 2<sup>nd</sup> Defendant testified as DW1 by adopting his written statement dated 21.10.2022 as evidence in chief. She stated that the suit land was a wedding gift to her in March 1987 by her parents in law, and that she is yet to transfer it in their names. That the Plaintiff was her tenant who faithfully paid rent. She added that they needed to renovate the old structures which caused them to issue vacate notice but the Plaintiff resisted and came up with the ownership claims.
10. She stated that although she does not have evidence to show that the suit property was gifted but the 1<sup>st</sup> Defendant (her husband) is the son to Samuel Mbugua and Grace Muthoni.

### **Submissions.**

11. The Plaintiff and the Defendants filed submissions dated 8<sup>th</sup> May 2023 and 10<sup>th</sup> May 2023 respectively. The Plaintiff narrated that he was a resident at the suit property and he was evicted losing a lot of his belongings during the Covid-19 epidemic. He submitted that there is a Kindergarten and primary school which covers over 10 acres fenced by a wall all round and that what remains outside of that wall is his interest. He also submitted that the old structures that housed him and other tenants were built way back in 1950s belonging to the white settlers. He also submitted that the case in the lower court was dismissed because it lacked pecuniary jurisdiction.
12. The Defendants submitted that Plaintiffs testimony and pleadings contain lies, inconsistencies and contradictions. They submitted that the Plaintiff testified that his brother transferred the land to him but there was no evidence. While in the Plaintiff's pleading, he stated that the then Provincial Administration allocated the suit land to him. The Defendants further submit that in the Plaintiff's pleading, the Plaintiff was claiming the suit property through adverse possession, but during cross examination, he testified that his interest was only on the rented property.
13. The Defendants relied in the court of appeal decisions in the cases *Mtara Lewa v Kabindi Neala Mwagandi* (2015) eKLR and Kisumu Civ App. No. 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR and submitted that the person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.

### **Analysis.**

14. The Plaintiff brought an adverse possession claim stating that he has been on the suit property since the year 2003 before the Defendants evicted him in 2019. He however stated that the land was allocated to him by the then Provincial Administration and also testified that the suit property was transferred to him by his brother.
15. It is a settled position that parties are bound by their pleadings. This was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & ano. v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC. expressed himself thus on the importance and place of pleadings: -

“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

16. The Supreme Court of Kenya in its ruling in the case of *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR held as follows: -

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

17. Going back to the pleadings and the evidence in this matter, it is my considered view that the evidence tendered by the Plaintiff does not support the claim as contained in the pleadings. The Plaintiff pleaded that he is the owner of the suit property through adverse possession and also pleaded that the suit property was allocated to him.

18. In the case of *Samuel Miki Waweru v Jane Njeru Richu*, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following *dictum*:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”

19. During cross examination, the Plaintiff confirmed that he used to pay a fee to the Defendants for the use of the suit property. The Defendants also produced samples of receipts issued to the Plaintiff dating as far back as 2007 and 2013 for payment of rents. The Defendants further produced tenancy agreements with third parties to support the averment that they are indeed in occupation of the suit premises which was let out to the Plaintiff and others. These evidence demonstrate that the Plaintiff's occupation of the suit property was with the full knowledge and permission of the Defendants.

20. Secondly, the Plaintiff in his evidence to court admitted that he was no longer staying in the suit premises as he had been ejected by the Defendants. There is a copy of demand notice dated 27<sup>th</sup> April 2020 seeking for payment of rent arrears and also reminding the Plaintiff to vacate the suit premises pursuant to the earlier notice dated 30<sup>th</sup> January 2019. The Plaintiff does not dispute that the receipts produced in evidence were never issued to him. Therefore, the claim for adverse possession cannot lie where his occupation was as licensee and or tenant.

21. In a bid to prove that he was claiming the suit land as the owner, pursuant to a transfer from his brother, the Plaintiff produced an original of an indenture dated 26<sup>th</sup> November 1970 which on its face at page 2 showed a transfer of L.R No. 27/13 (original number 27/1/7) measuring 3Ha. to the Plaintiff. The Transfer was registered on 17<sup>th</sup> November 2020. The Plaintiff has not levelled any particulars of fraud against the Defendants who also laid ownership rights to the suit property by producing a title and a certificate of official search. The Defendants title was registered on 26<sup>th</sup> November 1970. In the absence of fraud levelled and proved as against the Defendants, I shall adopt the equitable doctrine of the first in time prevails to hold the Defendants interests in the land as superior to the Plaintiff.



22. In summary, this court finds that the Plaintiff's case is not proved and it is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023**

**A. OMOLLO**

**JUDGE**

