



Omacho {Suing as the Legal Representative of the Estate of Anderson Angima Masese - Deceased} v Magonchi (Enviromental and Land Originating Summons E009 of 2022) [2025] KEELC 3902 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022**

M SILA, J

MAY 15, 2025

BETWEEN

ANGIMA OMACHE {SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANDERSON ANGIMA MASESE - DECEASED) PLAINTIFF

AND

ISAIAH MAGONCHI DEFENDANT

JUDGMENT

1. The applicant in this Originating Summons (whom I will refer to as the plaintiff) sues on behalf of the estate of her father, Anderson Angima Masese alias Angima Masese (deceased), and it is her contention that the deceased acquired title, by way of adverse possession, to the land parcel Majoge/Bokimonge/365 measuring 5.5 acres (the suit land). That land is registered in the name of the respondent (whom I will refer to as the defendant). The deceased was a brother to the defendant and he owned the land parcel Majoge/Bokimonge/ 353 . It is averred that the deceased exchanged his land parcel, Majoge/Bokimonge/353, with the suit land, through an agreement entered into in 1993 and that he thereafter took possession of the suit land. It is contended that the deceased remained in peaceful possession for over 12 years and therefore the interest of the defendant has been extinguished.
2. The defendant filed a replying affidavit to oppose the suit. He asserted that the suit land is ancestral land where his family has been and that they have planted tea bushes. He stated that the plaintiff and her family have never been on the suit land as they reside in a Settlement Scheme in Nyamira County whereas the suit land is in Kenyena Sub-County in Kisii County. He denied that the deceased ever stayed on the suit land only that he had land which bordered the suit land. He averred that the suit land is now subdivided into portions for his children who are currently cultivating therein and that the plaintiff is keen to render him and his family homeless. He stated that if the suit is allowed, he will suffer loss as he will have no land to cultivate or live on. On the alleged exchange of land, he deposed



- that this did not materialize since the deceased sold the land intended for exchange, rendering it null and void and he thus did not move out of his land.
3. Directions were taken for the suit to be heard by way of viva voce evidence.
 4. PW-1 was the plaintiff. She testified that her father owned the land parcel Majoge/Bokimonge/353 and a parcel No. 54 in a Settlement Scheme. Upon his death a succession cause was filed citing the two properties. Upon succession they transferred parcel Majoge/Bokimonge/353 to a limited liability company by name of Angima Farm Incorporated. She testified that this land parcel Majoge/Bokimonge/353 (which was previously registered in name of her father) is occupied by the defendant and this is where his houses and home are located. On the other hand, her late father occupied the suit land i.e Majoge/Bokimonge/365 registered in the name of the defendant. She elaborated that this was pursuant to the exchange agreement of 19 September 1993 that the two brothers had. She testified that from 1993 the defendant never came to claim the suit land and they have been living on it peacefully. Her father died in November 2019. She testified that after he died, they tried to have the suit land transferred to his name but the defendant declined. She stated that they are ready to transfer the title to the land parcel Majoge/Bokimonge/353 to the defendant since this is where he stays. She averred that on the suit land they have tea and cultivate maize every year. They also have houses on the land. She stated that there is a small section near the road which they gave to an uncle of her father to cultivate some tea. She produced the tea delivery notes and payments. She averred that the occupation as she has described is affirmed by a survey report that she had.
 5. Cross-examined, she testified that she was born in 1954 in her father's land was the parcel Majoge/Bokimonge/353. In 1964, her father moved to the Settlement Scheme and he resided there though he regularly visited his ancestral home where the suit land is located. The defendant remained back home and he built his homestead in the land parcel Majoge/Bokimonge/353 which is also where he farmed. She stated that on the suit land (parcel No.365), her father built two houses; he used to live in one and her grandmother lived in the other.
 6. PW-2 was Samuel Otuoma Ombati Masese. He is a brother to both the deceased and the defendant. His evidence was that the deceased and the defendant exchanged their respective parcels of land. He was present when the two exchanged their parcels of land. He stated that the defendant now lives on the land that he acquired upon the exchange. He testified that the deceased planted tea and made houses on the suit land. Cross-examined, he testified that the deceased resided in the Settlement Scheme but used to come to the ancestral land to check on his tea. He testified that the defendant has been living in the land parcel No. Majoge/Bokimonge/353 since 1964. He testified that it was the defendant who requested for the exchange since he used to live in this parcel No. 353 whereas the deceased was working on the parcel No. 365 (the suit land).
 7. PW-3 was Zablon Mogoi Onyango. He is cousin to the deceased and the defendant. He was present when the exchange agreement of 1993 was done.
 8. PW-4 was Paul Osiemo Ombati. He is son to Samuel Ombati Masese (PW-2) and thus a nephew of the deceased and the defendant. He testified that he acted as caretaker of the deceased on the suit land. He stated that he has been taking care of it since 2003. He testified that they used to make bricks on the land, they planted trees and cultivated bananas, maize and tea. He affirmed that there are two houses on the suit land which belonged to the deceased and that the defendant has been in occupation of the land parcel Majoge/Bokimonge/353.
 9. PW-5 was Evans Masese Ombati. He is also a nephew to both the deceased and the defendant. His evidence was that he signed the exchange agreement between the two. He testified that the defendant



now lives in the parcel Majoge/Bokimonge/353 with his family and even some of his family members are buried there.

10. With the above evidence, the plaintiff closed her case.
11. The defendant testified and called one witness. He testified that when the deceased bought land in the Settlement Scheme he went there to work for him and he did so for 8 years before returning back home. When he came back, their mother instructed the deceased to give him a portion of land in the Settlement Scheme. The deceased stated that he would leave for him the land parcel No. Majoge/Bokimonge/353 and in return he gives him two bulls which he gave him. He stated that he promised to transfer to him the land parcel No.353 when he was transferring to himself the land in the Settlement Scheme. He however did not do so. He affirmed that it is in this land parcel Majoge/Bokimonge/ 353 where he stays but on the basis that he bought it. He asserted that the suit land is his and he is not willing to give it up. Cross-examined, he confirmed that he lives in the parcel Majoge/Bokimonge/353 and this is where he has his wives and children. He stated that there are 17 houses on this parcel No. 353 belonging to him. He has buried 10 of his children in this land parcel No. 353. He also confirmed that the deceased and his family have been the ones cultivating the suit land i.e Majoge/Bokimonge/365. He nevertheless asserted that he purchased the land parcel No. 353 with two bulls being the consideration in 1964. This purchase agreement was however not put down in writing. He claimed that the deceased was to give him a share of the land in the Settlement Scheme but instead opted to give him his land at home because he had worked for him. He has not distributed the suit land to any of his family members. He claimed that at some point he was sick and since he had no money, the deceased took him to hospital and to repay him, he allowed him to harvest his tea for one year. He stated that this happened in the year 2020 and he was therefore to exit in 2021. He claimed that it was him who planted the tea. He denied writing an agreement in 1993 exchanging land with the deceased.
12. DW-2 was Enock Masese Kengere. He is a nephew to the deceased. His evidence was that the deceased and the defendant agreed to sell land in 1968. Cross-examined, he testified that he was born in 1962 though he claimed to have been present during the sale of land transaction. He nevertheless confirmed that it is the family of the deceased who are on the suit land.
13. With the above evidence the defence closed its case.
14. Counsel filed their written submissions which I have taken into consideration before arriving at my decision. I will be brief in my disposition because to me the evidence is very clear.
15. This is a case for adverse possession and it is trite that to succeed in such suit one needs to demonstrate open, peaceful, and uninterrupted possession of the land claimed for a duration of 12 years. In our case, it is the contention of the plaintiff that the deceased possessed the suit land at least from the year 1993 when he exchanged his land parcel Majoge/Bokimonge/ 353 with the defendant and the deceased had therefore kept possession for a duration in excess of 12 years.
16. I think the evidence is overwhelming that there was actually an exchange agreement entered into in 1993. The agreement itself was produced and witnesses who were present confirmed the existence of this agreement. There is also overwhelming evidence that the deceased and his family utilized this land parcel Majoge/Bokimonge/365 and cultivated tea and other seasonal crops. The defendant himself in his evidence in court confirmed that he does not reside in the suit land and neither does he utilize it. He confirmed that it is the deceased who used the land and now the user of it is continued by his descendants.
17. None of the defendant's immediate family members reside or utilize the suit land. Indeed, all the houses of the defendant and his immediate family are in the land parcel Majoge/Bokimonge/365 that was



registered in the name of the deceased and it is here that he buried his kin who died. The manner in which the deceased and the defendant used the two land parcels confirms that each had relinquished interest of their respective registered parcels of land. What did not happen is a formal transfer of the respective parcels of land so that each now obtains title pursuant to the exchange agreement. In so far as possession of the suit land is concerned, there is no doubt that the deceased was in possession at least from the year 1993 till he died in 2019 which is a period in excess of 25 years. There is no evidence of him having parted with possession and no evidence of the defendant resuming possession during this period of time. There is also no evidence that his possession was not peaceful. It certainly was peaceful because he farmed the land without any hindrance. Any interest that the defendant may have had in the suit land is clearly now extinguished as 12 years are long lapsed.

18. In his evidence, the defendant of course claimed that there was no exchange agreement and that he purchased the land parcel No. Majoge/Bokimonge/353 from the deceased. There is no evidence to support this allegation which to me is actually a wild allegation and a complete afterthought. It is an afterthought as it was never mentioned in the replying affidavit. In fact almost everything that he deposed in his replying affidavit has turned out to be false. In his replying affidavit he claimed that he was the one in possession of the suit land and that he has subdivided portions of it to his children. This of course is not true. He also claimed that the exchange of land agreement did not materialize because the deceased sold his land and that he never moved out of it. This again is a falsehood as there is no evidence of any sale of land. When he testified, he claimed that he only allowed the deceased to pluck tea for the year 2020, but this again cannot be true since the deceased died in 2019 and was not there in 2020 to agree to pluck tea for only one year. The defendant is a pathological liar which is very unfortunate given his age. One would expect better from such an elder.
19. From the evidence, it would appear that during his lifetime, the deceased really went out of his way to assist the defendant. He engaged him in some work in the Settlement Scheme. There was also evidence that he allowed him use of a posho mill that the deceased had invested in. It is sad that despite being a brother, the defendant is now keen to defraud the family of the deceased. I am unable to understand this sort of greed.
20. Back to the issue at hand, I am fully persuaded, as I have earlier elaborated, that the deceased had acquired title to the suit land by way of adverse possession. This suit is fully merited. I enter Judgment in favour of the plaintiff and make the order that the estate of the deceased is entitled to the suit land i.e the land parcel Majoge/Bokimonge/365 by way of adverse possession. I order the defendant to immediately transfer this land parcel Majoge/Bokimonge/365 into the estate of the deceased. In default, the Deputy Registrar and/or a person assigned by him to execute all requisite documents necessary to have the land parcel Majoge/Bokimonge/365 transferred into the name of the estate of the deceased. Thereafter the land be subjected to the usual succession process for purposes of distribution to the beneficiaries of the estate of the deceased.
21. The last issue is costs. I have agonised over it given the relationship of the parties. But clearly, the defendant acted in bad faith and had no reason to contest this suit. In those circumstances, the costs will follow the event i.e the defendant to pay the costs of the suit to the plaintiff.
22. Judgment accordingly.

DATED AND DELIVERED THIS 15 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII



Delivered in the presence of :

Mr. Ondika for the defendant

No Appearance on the part of Mr. Sonye Ondari for the plaintiff

Court Assistant – Michael Oyuko

