



**Ogake & another v Yala & 2 others (Environment & Land Case 2 of 2016 & 30 of 2018 (Consolidated)) [2025] KEELC 134 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 134 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 2 OF 2016 & 30 OF 2018 (CONSOLIDATED)  
BN OLAO, J  
JANUARY 23, 2025**

**BETWEEN**

**ASUMPTA ODUMA OGAKE ..... PLAINTIFF**

**AND**

**JANE ACHIENG YALA ..... DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 30 OF 2018**

**BETWEEN**

**JANE ACHIENG YALA ..... PLAINTIFF**

**AND**

**JOSEPH OUMA ODHIAMBO ..... 1<sup>ST</sup> DEFENDANT**

**ASUMPTA ODUMA OGAKE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This Judgment is in respect to the above two cases which were consolidated by Omollo J on 17<sup>th</sup> October 2019 for purposes of hearing. Busia ELC case NO 3 of 2016 became the lead file. The plaintiff in Busia ELC case No 3 of 2016 became the plaintiff while the Originating Summons in Busia ELC case No 30 of 2018 became the counter-claim.
2. Asumpta Oduma Ogake (the Plaintiff) moved to this court vide her plaint dated 14<sup>th</sup> October 2015 and filed on 12<sup>th</sup> January 2016 in which she sought against Jane Achieng Yala (the defendant) judgment in the following terms with respect to the land parcel No South Teso/Angoromo/6077 (the suit land):



1. An order of eviction against the Defendant, her family members, agents, servants and persons working under her and a permanent injunction restraining the defendant, her family members, agents, servants and persons working under her from re-entering the plaintiff's land parcel NO South Teso/Angoromo/6077.
2. Costs.
3. Interest.
4. Any other or further relief this Honourable Court deems fit and just to grant.

The basis of the plaintiff's case is that she is the absolute registered proprietor of the suit land but in October 2014 or thereabout, the defendant without any colour of right illegally trespassed thereon in her absence and proceeded to put up semi-permanent structures. And despite notice of intention to sue, the defendant has persisted with the same trespass thus necessitating the filing of this suit.

3. The plaintiff filed her witness statement dated 14<sup>th</sup> October in which she repeated the averments in her plaint only adding that the suit land measures 50 x 100 feet (0.05 Hectares). She also filed the following documents in support of her case;

1. Copy of title deed for the land parcel NO South Teso/Angoromo/6077.
2. Copy of Certificate of Official Search for the land parcel NO South Teso/Angoromo/6077.
3. Copy of sale agreement between the plaintiff as purchaser and one Joseph Ouma Odhiambo as vendor dated 15<sup>th</sup> October 2014 for the purchase of the suit land.
4. Copy of application for consent of the Land Control Board dated 16<sup>th</sup> January 2014.
5. Copy of letter of consent dated 18<sup>th</sup> December 2013.
6. Transfer of land Form.

The plaintiff also filed a statement of her witness Joseph Ouma Odhiambo (PW2) dated 16<sup>th</sup> April 2018.

4. In the said statement, the witness confirms that she sold the defendant a portion of land measuring 100 x 25 feet out of the suit land where she put up semi-permanent structures. He later learnt that the defendant got a portion measuring 50 x 100 feet instead of 25 x 100 feet and it was agreed that the portion be re-surveyed. However, the defendant did not turn up for the re-survey exercise but instead put up a house.
5. He added that the defendant has not been in peaceful occupation of the portion since 2001 as alleged and only put up a house in 2014 after realizing that the plaintiff had a title for 0.05 Hectares.
6. The defendant filed an amended statement of defence and a counter-claim dated 7<sup>th</sup> March 2016. She admitted that the plaintiff is the registered proprietor of the suit land but denied that the plaintiff is in exclusive possession thereof. She pleaded further that she had purchased a portion of the suit land measuring 0.05 Hectares from Joseph Ouma Odhiambo in 2001 and built a home thereon and therefore the plaintiff's title has been extinguished.
7. In her counter-claim, the defendant pleaded that she and her family have been living on the purchased land since January 2001 a period of over of over 12 years and has therefore acquired a portion of the suit land measuring 0.05 Hectares by way of adverse possession. She therefore sought the following orders:
  1. The plaintiff's suit be dismissed with costs.



2. A declaration that the defendant has acquired by way of adverse possession a portion of land measuring 0.05 Hectares out of the suit land.
  3. Costs of the Counter-claim.
  4. Any other or further relief which this court may deem fit to grant.
8. The defendant also filed an affidavit dated 16<sup>th</sup> August 2017. Therein, she deposed, inter alia, that whereas the plaintiff is indeed the registered proprietor of the suit land, that registration has always been subject to the defendant's overriding interest. That the Defendant bought a portion of land from Joseph Ouma Odhiambo which is demarcated and is now parcel No South Angoromo/2625 where she has built a home and cultivates. She has been in peaceful, open and continuous occupation thereof since 2001 but the said Joseph Odhiambo Ouma has avoided signing the application to the Land Control Board and other documents.
9. The defendant filed the following documents:
1. Copy of register for the land parcel NO South Teso/Angoromo/2625.
  2. Copy of register for the land parcel NO South Teso/Angoromo/6077.
  3. Mutation Form for the land parcel NO South Teso/Angoromo/2625.
  4. Copy of sale agreement dated 19<sup>th</sup> January 2001 between Joseph Ouma Odhiambo as vendor and the defendant as purchaser for a portion of land measuring 100 feet by 25 feet out of the land parcel NO South Teso/Angoromo/2625.
  5. Application for consent of Land Control Board.
10. The plaintiff filed a reply to defence and defence to the counter-claim. She joined issues with the defendant and denied that her title to the suit land has been extinguished adding that the defendant had in fact trespassed onto the suit land in 2013 and not in 2001. She also denied that on or about 19<sup>th</sup> January 2001, Joseph Ouma had sold the defendant a portion of land measuring 0.05 Hectares where she has been living since 2001. She sought the dismissal of the defendant's counter-claim.
11. By an Originating Summons dated 28<sup>th</sup> December 2017 and filed in Busia ELC case NO 30 of 2018, the defendant impleaded the plaintiff and one Joseph Ouma Odhiambo (1<sup>st</sup> Defendant) seeking orders in adverse possession over a portion measuring 0.05 Hectares out of the suit land. She pleaded that the plaintiff and Joseph Ouma Odhiambo are the successive registered proprietors of the suit land but she purchased land from the said Joseph Ouma Odhiambo out of the parcel NO South Teso/Angoromo/2625 which is now the suit land and on which she has built a home and lived since 2001 to-date.
12. She therefore sought a determination of the following questions against the plaintiff and Joseph Ouma Odhiambo:
1. Whether the defendant has been in open, physical and notorious possession and occupation of a portion of land measuring 0.05 Hectares presently known as parcel NO South Teso/Angoromo/6077 for a period exceeding 12 years continuously without interruption peacefully and/or without force.
  2. Whether the title of the plaintiff and Joseph Ouma Odhiambo over the land parcel NO South Teso/Angoromo/6077 was extinguished upon the expiry of 12 years from the time the defendant went into physical occupation and possession of the said land.



3. Whether the defendant has now acquired title to the said parcel of land by way of adverse possession.
  4. Whether the defendant should be registered as the proprietor of the suit land.
  5. Whether the title of the plaintiff and Joseph Ouma Odhiambo was subject to the defendant's overriding interest under the [Land Registration Act](#).
  6. Whether the defendant has acquired ownership adversely against the plaintiff and Joseph Ouma Odhiambo.
13. Arising out of the above, the defendant sought judgment against the plaintiff and Joseph Ouma Odhiambo in the following terms:
1. That the defendant be and is hereby declared to have acquired ownership of title to the land parcel NO South Teso/Angoromo/6077 by virtue of adverse possession.
  2. That the plaintiff and Joseph Ouma Odhiambo be ordered to sign all the necessary documents for consent for the transfer of the land parcel NO South Teso/Angoromo/6077 to the defendant and in default thereof, the Deputy Registrar be empowered to sign on the plaintiffs' behalf.

In addition to the affidavit in support of the Originating Summons, the defendant filed the following documents:

1. Copy of the register for the land parcel NO South Teso/Angoromo/6077.
2. Copy of the register for the land parcel NO South Teso/Angoromo/2625.
3. Copy of the Mutation Form for the land parcel NO South Teso/Angoromo/2625.
4. Copy of sale agreement between Joseph Ouma Odhiambo as vendor and the defendant as purchaser for the land parcel NO South Teso/Angoromo/2625.
5. Copy of application for consent of the Land Control Board.

The record shows that neither the plaintiff nor Joseph Ouma Odhiambo filed any response to the Originating Summons in Busia ELC case NO 30 of 2018. Further the Defendant, though initially represented by the firm of Wanyama & Company Advocates and subsequently by the firm of Okeyo Ochiel & Company Advocates, filed a Notice to act in person on 29<sup>th</sup> June 2022.

14. The hearing commenced on 30<sup>th</sup> June 2022 when the plaintiff testified. She adopted as her testimony the contents of her statement dated 14<sup>th</sup> October 2015. It was adjourned to enable her call her witness Joseph Ouma Odhiambo (PW2) who testified before me on 3<sup>rd</sup> October 2024 and who is in fact the 1<sup>st</sup> defendant in the Originating Summons filed in Busia ELC case NO 30 of 2018. He too adopted as his testimony the contents of his statement dated 16<sup>th</sup> April 2018. On both hearing dates, the Defendant did not attend court though served and MR Onsongo counsel for the plaintiff asked the court to mark the defendant's case as closed and dismiss her counter-claim. The court agreed and allowed the plaintiff's counsel to file his submissions which he did on 18<sup>th</sup> October 2024.
15. I have considered the plaintiff's evidence and that of her witness which is unrebutted as well as the submissions by counsel.
16. The plaintiff's case is that she is the registered proprietor of the suit land on which the defendant has trespassed and built a semi-permanent structure. The plaintiff therefore seeks the eviction of the



defendant therefrom and an order of permanent injunction restraining her, her family members, agents, servants and persons working under her from re-entering the said land.

17. The defendant on the other hand not only filed a defence and counter-claim in which she pleaded that she had lawfully purchased the suit land and occupied it since 2001 but she also filed her Originating Summons in which she added that she is entitled to the orders that she has acquired the suit land by way of adverse possession.
18. I consider the following issues to be crucial in the determination of this dispute. These are:
  1. Whether the defendant has proved her Originating Summons in Busia ELC case NO 30 of 2018 against the plaintiff and Joseph Ouma Odhiambo who is sued therein as 1<sup>st</sup> defendant while the plaintiff is sued as the 2<sup>nd</sup> defendant in Busia ELC case NO 30 of 2018.
  2. Whether the defendant has proved her counter-claim against the plaintiff in Busia ELC case NO 3 of 2016.
  3. Whether the plaintiff has proved her case against the defendant in Busia ELC case NO 3 of 2016.
  4. Who meets the costs of the suit.

I shall consider the above in that sequence though (1) and (2) above can be considered together since they embody the defendant's claim to the suit land in adverse possession.

### **1. Proof of Adverse Possession.**

19. This is contained both in the defendant's counter-claim as well as the Originating Summons.
20. As regards the defendant's claim against Joseph Ouma Odhiambo, the evidence through the register shows that as at the time of filing the suits both in Busia ELC case NO 3 of 2016 and Busia ELC case NO 30 of 2018 (O.S), the registered proprietor of the suit land was the plaintiff. Joseph Ouma Odhiambo who was sued in Busia ELC case NO 30 of 2018 (O.S) as the 1<sup>st</sup> defendant was the first registered proprietor of the suit land on 4<sup>th</sup> February 2002. On 10<sup>th</sup> September 2014, it was registered in the name of the plaintiff. A claim in adverse possession is a claim against the registered proprietor of the land in dispute. It cannot be filed against a previous owner who has since relinquished ownership thereof. The Originating Summons filed in Busia ELC case NO 30 of 2018 (O.S) must therefore be struck out as against the said Joseph Ouma Odhiambo.
21. With regard to the defendant's counter-claim in Busia ELC case NO 3 of 2016, she did not attend court and therefore she did not testify in support of her case against the plaintiff. All that this court has therefore are her pleadings in the counter-claim. Pleadings are not evidence upon which a court can base a determination in a judgment. The defendant needed to attend court, testify and be cross-examined in support of her pleadings. In the case of *CMC Aviation Ltd -v- Kenya Airways Ltd (cruisair LTD)* 1978 eKLR [1976-80 I KLR 835] MADAN J.A (as he then was) said:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of ‘evidence’ in Section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven.



Averments in no way satisfy, for example, the following definition of evidence in Casell's English Dictionary p.394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

The Judge went on to add:

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the submission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

Therefore, the defendant's defence and counter-claim in themselves are not enough to rebut the plaintiff's testimony nor are they evidence in proof of her counter-claim.

22. Secondly, although the defendant filed an affidavit in support of her counter-claim, she was still required to attend court, be sworn and cross-examined on its contents since this was a full trial and not a mere application in which the court can rely on without having to call the deponent. That means, therefore, that the defendant's Originating Summons in Busia ELC case NO 30 of 2018 and counter-claim in Busia ELC case NO 3 of 2016 are not proved. The same are hereby both dismissed.

## **2. Has The Plaintiff Proved Her Case:**

23. The plaintiff's case is that the defendant has trespassed onto the suit land and should be evicted therefrom.
24. The registration of the plaintiff as the proprietor of the suit land is not in doubt. Indeed in her Originating Summons, the defendant acknowledges that fact but adds that the plaintiff's registration is subject to her (defendant's) overriding interest since she has been in occupation thereof for over 12 years and is therefore entitled to orders that she has acquired the same by way of adverse possession. That is what the defendant also claimed in her defence and counter-claim. However, as is now clear, the defendant did not testify during the trial and therefore, her mere pleadings and other averments do not dislodge the plaintiff's claim.
25. As the registered proprietor of the suit land, the plaintiff is entitled to enjoy the rights provided for in Section 24 (a) of the [Land Registration Act](#) which include “the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto; ...” Those rights entitle the plaintiff to evict the defendant from the suit land and also to obtain orders permanently injunctioning her, and those claiming through her, from interfering with the suit land. And since the defendant did not testify, the plaintiff's testimony remains un-controverted and this court must therefore find in her favour. This is for the same reason as above since the defendant's bare defence filed in Busia ELC case No 30 of 2018 is not evidence which can dislodge the plaintiff's testimony and which I find to be credible – CMC Aviation Ltd -v- Kenya Airways Ltd (cruisair LTD) – supra.
26. Having considered the plaintiff's un-controverted evidence, I am satisfied that she has proved her case to the required standard and is entitled to the remedies of eviction and permanent injunction against the defendant with respect to the suit land.
27. Ultimately therefore, there shall be judgment for Asumpta Oduma Ogake (the plaintiff) against Jane Achieng Yala (the defendant) as follows:



1. The Defendant shall within 90 days from the date of this Judgment vacate from the land parcel NO South Teso/Angoromo/6077 or be evicted therefrom in accordance with the relevant law.
2. Thereafter, the defendant, her family members, agents, servants and any person claiming under her shall be permanently enjoined from re-entering or interfering with the plaintiff's occupation and use of the said land.
3. The defendant shall meet the plaintiff's costs.
4. The defendant's counter-claim against Joseph Ouma Odhiambo in Busia ELC case NO 30 of 2018 is struck out with no orders as to costs.
5. The Defendant's counter-claim against the plaintiff in Busia ELC case NO 30 of 2018 is dismissed.
6. The defendant shall meet the plaintiff's costs of the dismissed counter-claim.

**BOAZ N. OLAO**

**JUDGE**

**23<sup>RD</sup> JANUARY 2025**

Judgment dated, signed and delivered in Open Court on this 23<sup>rd</sup> day of January 2025.

Mr. Makokha for Mr. Onsongo for Plaintiff Present.

Defendant Absent.

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**23<sup>RD</sup> JANUARY 2025**

