



**Imbo v Magadi (Sued as the administrator of the Estate of Salmon Magadi
Kwaka - Deceased) (Environmental and Land Originating Summons
E009 of 2022) [2024] KEELC 5900 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022
GMA ONGONDO, J
SEPTEMBER 17, 2024**

BETWEEN

BELDINA AUMA IMBO PLAINTIFF

AND

**JOSHUA OTIENO MAGADI (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF SALMON MAGADI KWAKA - DECEASED) DEFENDANT**

JUDGMENT

1. On 24th January 2023, the plaintiff who is represented by Nyakwamba and Company Advocates, initiated the instant suit by way of an amended Originating Summons dated 22nd December 2022, pursuant to Order 51 Rule 1 and Order 37 Rule 7 of the Civil Procedure Rules 2010 as read with Sections 1A, 1 B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. She is seeking the orders infra:
 - a. The honourable court be pleased to declare that the plaintiff has acquired part of land parcel number Kasgunga/ Kamreri 2525 (the suit land herein) measuring 5.31 Ha adversely and she is therefore entitled to be registered as the legal owner of the part thereof.
 - b. The honourable court be pleased to subsequently order the Homa Bay County Land Registrar to rectify the land register with respect to a part of the suit land and to have the plaintiff duly registered as the owner over the said portion of the suit land measuring 5.31 Ha.
 - c. The costs of this application be provided for and made payable by the defendant to the plaintiff.
2. The originating summons is anchored on grounds (1) to (7) on the face thereof and a fifteen (15) paragraphed supporting affidavit of the plaintiff sworn on even date and a copy of the official search certificate (BAI 1), a copy of sale agreement dated 26th March 1989 (BAI 2) and a copy of sale agreement



- dated 15th May 1992 (BAI 3) annexed to the affidavit. The plaintiff deposed, inter alia, that the suit land belongs to Salmon Magadi Kwaka (deceased 1). That her late husband (deceased 2) purchased the disputed portion of the suit land from deceased 1 and took possession thereof. That unfortunately, deceased 2 passed on before deceased 1 could transfer the portion to him. That she has been in open, quiet, exclusive and uninterrupted possession of the disputed portion of the suit land for over 30 years.
3. PW1, Beldina Auma Imbo, relied on her statement dated 6th October 2022, which was adopted as part of her evidence. She further relied on the documents marked as BAI-1, BAI-2 and BAI-3, to wit, a copy of the official search certificate (BAI 1), a copy of sale agreement dated 26th March 1989 (BAI 2) and a copy of sale agreement dated 15th May 1992 (BAI 3) and annexed to the supporting affidavit. She averred that she has lived on the disputed portion of the suit land for over 30 years. That such occupation has never been interrupted.
 4. PW2, Benard Sure, relied on his statement filed on 25th May 2022, which was adopted as part of his evidence. He stated that he is a neighbor to PW1 and corroborated her assertion that she has been in uninterrupted occupation of the disputed portion of the suit land for a period exceeding 30 years.
 5. The defendant, acting in person, opposed the claim vide an undated replying defence (I think the defendant meant a replying affidavit) filed on 27th October 2022. He deposed, in part, that the plaintiff occupies a different parcel of land and not the suit land herein. That the sale agreements produced in evidence by the plaintiff, are forgeries since the National Identification Numbers of the parties and the witnesses thereof are not indicated. That the plaintiff had earlier instituted a suit over the suit land at Mbita Principal Magistrate's Court but the court found in favour of the defendant herein.
 6. Notably, the defendant did not testify in his defence.
 7. The plaintiff's counsel filed submissions dated 25th June 2024 and stated that the plaintiff's entry and occupation of the suit land is open, adverse, peaceful and has been uninterrupted since 1989 to date. That therefore, she has acquired title to the same by way of adverse possession. Thus, counsel implored the court to allow the suit with costs. Reliance was placed on the case of *Kasuve -vs- Mwaani Investments Limited & 4 others* 1 KLR 184, to buttress the submissions.
 8. The defendant did not file any submissions herein.
 9. I have anxiously considered the parties' respective pleadings, evidence and plaintiff's written submissions. The issue for determination is whether the plaintiff has met the threshold for the orders set out on the face of the originating summons and as noted in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another* (2015) eKLR, that adverse possession dictates thus;
 - a. The parcel of land in dispute 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 be 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.
 10. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi* (2020) eKLR.
 11. It is important to note that the plaintiff's claim is for part of land parcel number Kasungu/ Kamreri 2525 (the suit land herein) measuring approximately five decimal three one hectares (5.31 Ha) in area.



So, the plaintiff's claim is over a definite portion of land as held in Muthuita –vs- Wanoe & 2 others (2008) 1KLR (G&F) 1024.

12. In the first instance, the suit land is registered in the name of Salmon Magadi Kwaka (deceased 1), whose estate is being administered by the defendant herein. This is evidenced by a copy of the title deed attached to the defendant's defence. The same indicates the approximate acreage of the suit land as sixteen decimal one five hectares (16.15 Ha).
13. Concerning the issue of open and exclusive possession, the plaintiff (PW1) testified that she has lived on the suit land since 1989 to date. However, the defendant contends that the plaintiff occupies a different parcel of land and not the suit land herein.
14. The plaintiff's testimony was corroborated by the testimony of PW2 who stated in part thus:

“... I know PW1 who has lived on the suit land for over 30 years. She is my neighbour...”
15. It is established law that possession can take different forms such as fencing or cultivation of the land in dispute; see Titus Ong'ang'a Nyachio -vs- Martin Okioma Nyauma & 3 others (2017) eKLR.
16. As regards the period of possession and having dispossessed the owner, PW1 asserted that she has been in open, quiet and peaceful use of the suit land since 1989 to date. That she entered the disputed portion of the suit land following a sale of the same by deceased 1 to her late husband (deceased 2). She produced in evidence copies of two sale agreements dated 26th March 1989 (BAI 2) and 15th May 1992 (BAI 3) to reinforce her assertion.
17. Upon examination of the sale agreements tendered in evidence by the plaintiff, I note that: deceased 1 and 2 initially entered into an agreement for sale of a portion of the suit land measuring approximately 3 acres in area. The same is dated 26th May 1989 and is duly executed by the parties and attested to by their witnesses. The National Identification Number of the seller is indicated therein. The agreed purchase price of Kshs. 3000 is indicated as fully settled.
18. Further, the sale agreement dated 15th May 1992 which is between the same parties, is over a portion of the same land measuring approximately 7 acres. It is duly executed by the parties and attested to by their witnesses. The National Identification Number of the seller is indicated therein. The agreed purchase price of Kshs. 15,400 is indicated as fully settled. It is pretty clear that the agreements meet the threshold of valid sale agreements.
19. Clearly, the plaintiff has been in possession of the disputed portion of the suit land for a period in excess of twelve years.
20. Regarding the defendant's allegations that the sale agreements are forgeries, I observe that he failed to lead evidence to demonstrate the existence of fraud during trial. In the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts...” (Emphasis added).



21. Additionally, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the court expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts...” (Emphasis added).

22. To that end, I hold that the plaintiff has proved the ingredients of adverse possession to the requisite standard as held in the case of *Wilson Kazungu Katana* (supra).

23. Accordingly, the instant suit generated by way of an amended Originating Summons dated 22nd December 2022 is hereby allowed in terms of orders 1, 2, 3 as indicated in paragraphs 1(a), (b) and (c) hereinabove.

24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 17TH DAY OF SEPTEMBER 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Nyakwamba, Learned Counsel for the plaintiff
2. Plaintiff
3. Terrence, Court Assistant

