



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMABAY

ELC O.S CASE NO.49 OF 2021

(FORMERLY MIGORI ELC OS 17 OF 2020)

NICHOLUS OGELO JABUYA .....PLAINTIFF

VERSUS

SYPRIANUS AWINO .....1<sup>ST</sup> DEFENDANT

LAWRENCE OCHIENG AMOLLO.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

**A. Introduction**

1) The Constitution of Kenya, 2010 (The Constitution herein) at Article 260 defines the term “Property” to include any vested or contingent right to, or interest in or arising from land or permanent fixtures on, or improvements to, land; In the same Article, the term “Land” includes-

- a) “the surface of the earth and the subsurface rock;
- b) any body of water on or under the surface;
- c) marine waters.....;
- d) natural resources.....;
- e) The air space above the surface;”

2) The central property in the present suit is Title number West Kasipul/Kotieno Kokech/1492 measuring approximately one decimal three zero hectares (1.30 Ha) in area (The suit property herein). It is located in Kasipul within Homa Bay County and contained in Registry Map Sheet number 26. The same is a sub division of land reference number West Kasipul/Kotieno Kokech/4 which measured approximately two decimal four hectares (2.4Ha) in area (The original property herein).

3) Originally, this suit was lodged at Migori Environment and Land Court. On 9th October 2021, the court (Kullow J) ordered and directed that the suit be transferred to this court, upon its establishment, for hearing and determination; see **Articles 6 (3) and 48 of the Constitution**.

4) The plaintiff, Nicholus Ogelo Jabuya is represented by O.H Bunde and Company Advocates. The 1<sup>st</sup> Defendant, Syprianus Awino and the 2<sup>nd</sup> defendant, Lawrence Ochieng Amollo are represented by the firm of Sila Munyao and Company Advocates and the firm of Kisaka and Associates Advocates respectively.

5) By the consent of counsel for the respective parties dated **15<sup>th</sup> April 2021** and duly filed in court on **29<sup>th</sup> June 2021**, this court gave directions, among others, that this suit be canvassed by way of written submissions. Clearly, item number 1 of the consent is to the effect that “THE NOTICE OF MOTION” be treated as “PLAINT.” However, in light of the preamble to the item that the application dated 22<sup>nd</sup> January 2021 be shelved, I think the words “NOTICE OF MOTION” meant “ORIGINATING SUMMONS” therein. Thus, the apparent error is hereby cured under section 19 (1) of the Environment and Land Court Act, 2015 (2011) as read with Article 159 (2) (d) of the Constitution.

**B. The gist of the Plaintiff’s case**

6) By an Originating Summons dated **14th December 2020** and amended on **22<sup>nd</sup> January 2021**, the plaintiff has sued the defendants seeking the following orders:

a) A declaration that the defendants' rights to recover the suit property formerly and or originally land known as the suit property is barred under the limitations of actions Act, **Chapter 22 of Laws of Kenya**, and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the suit property for a period exceeding 50 years.

b) There be an order that the plaintiff be registered as the proprietor of portion of the suit property formerly and or originally known as the suit property in place of the defendant who currently holds the title to the suit property.

c) There is an order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit property formerly and or originally known as the original property in any manner whatsoever and/or howsoever.

d) The Deputy Registrar and/or the Executive Officer of the Honourable Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the suit property formerly and or originally known as the original property in favor of the plaintiff, in the event of default by the defendant to execute the necessary transfer instruments.

e) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

7) The Originating Summons is anchored on an eighteen (18) paragraphed supporting affidavit sworn on even date by the plaintiff and the accompanying documents namely; title deed of the suit property in his name, a copy of certificate of official search, a copy of sale agreement, photographs and a copy of minutes from the area chief marked as "NOA 1(a),1 (b) , 2, 4 and NOA 5" but, I think meant, "NOA 1" to "NOA 4" as there is no document marked as "NOA 3" (PExhibits 1(a), 1(b) ,2,3 and 4 respectively).

8) The originating summons is further based on grounds (i) to (xv) set out on it's face which include-

a) **THAT** the land is registered in the name of LAWRENCE OCHIENG AMOLLO, the 2<sup>nd</sup> Defendant herein.

b) **THAT** prior to the registration of the said suit parcel in favour of the Defendants, the Plaintiff's late dad one **JABURA GUMA** had acquired the same land through purchase from **WEKE ONG'ONDO** in 1968.

c) **THAT** at the time of the purchase by plaintiff's dad in 1968, the land had not been adjudicated.

d) **THAT** the Plaintiff and his family have been on the land and have made substantial developments on it including but not limited to continuous cultivation of the said piece land known as LR No. WEST KASIPUL/KOTIENO KOKECH/1492 measuring 1.3 Hectares

e) **THAT** the said issue was discussed by the area chief and a conclusion was arrived at that plaintiff and his family has been in continuous occupation since 1968 todate.

f) In the premises, the Defendants herein have been privy to and/or aware of the plaintiff's rights over a portion of the suit land.

g) Consequently, the Defendant's rights to recover the portion of the suit land herein, has been extinguished by effluxion of time.

9) On 13<sup>th</sup> October 2020, learned counsel for the plaintiff filed submissions dated 10<sup>th</sup> October 2020 further to this court's orders and directions as stated in paragraph 5 hereinabove. Counsel gave brief and factual background of the matter including the averments of the plaintiff and the 1<sup>st</sup> defendant and identified three issues for determination, inter alia, whether the plaintiff is entitled to the prayers sought herein. It was submitted that the plaintiff's averments have not been controverted by the defendants and show that the plaintiff and his family have been in continuous occupation of the suit property since the year 1968 todate.

10) To buttress the submissions, counsel relied on the persuasive authorities namely **Josinter Atieno Ouma and another-versus- Joshua O.Omiti and another (2018) eKLR** and **Joseph Omosa Otwenya Chude –versus- Ontumba and another (2019) eKLR**. Counsel argued that the 1<sup>st</sup> defendant's interest over the suit property had been extinguished hence transfer of the suit property to the 2<sup>nd</sup> defendant, was null and void. Counsel urged this Court to allow the orders sought in the amended originating summons.

### **C. The 1<sup>st</sup> Defendants' case in brief**

11) The 1<sup>st</sup> defendant opposed the plaintiff's Originating Summons by a 21-paragraphed replying affidavit sworn on **17<sup>th</sup> June 2021** and filed herein on **22<sup>nd</sup> June 2021** and prayed for mesne profits for the illegal use of the suit property. He deposed, among others, that he started living on the suit property in the year 1962 and was it's registered owner but has since sold the same to the 2<sup>nd</sup> defendant. That the plaintiff encroached onto the suit property and started cultivating it. That it prompted him to file a suit, **Kisii HCCC No.156 of 1993** against the plaintiff's father, Ogelo Jabuya who was utilizing part of the suit property. That he obtained judgment against the plaintiff in the suit.

12) The 1<sup>st</sup> defendant further deposed that from the time of the said judgment, there have been confrontations and eviction as admitted by the

plaintiff in the pleading and evidence in this suit. Annexed to his affidavit are copies of the following documents:

- a) the original title deed marked as “SA-1”(1<sup>st</sup> DEXhibit 1)
- b) the current title in the name of the 2<sup>nd</sup> defendant marked as “SA-2” (1<sup>st</sup> DEXhibit 2)
- c) the court order in Kisii HCCC No. 156 of 1993 marked as “SA-3” (1<sup>st</sup> DEXhibit 3)
- d) a survey report marked as “SA-4” (1<sup>st</sup> DEXhibit 4)
- e) letter Ref A/73/93 dated 22<sup>nd</sup> October 1993 to the OCS, Oyugis Police Station marked as “SA-5” (1<sup>st</sup> DEXhibit 5)
- f) the 1<sup>st</sup> defendant’s p3 form dated 21<sup>st</sup> December 2004 marked as “SA-6” (1<sup>st</sup> DEXhibit 6)
- g) the charge sheet dated 18<sup>th</sup> May 2005 in Oyugis SRMC Criminal case No. 446 of 2004 marked as “SA-7.” (1<sup>st</sup> DEXhibit 7)

13) By the submissions dated **12<sup>th</sup> August 2021** and duly filed in court on **17<sup>th</sup> August 2021**, learned counsel for the 1<sup>st</sup> defendant urged this court to dismiss the suit with costs as the plaintiff has failed to prove his claim against the defendants and reference was made to the originating summons and the 1<sup>st</sup> defendant’s contention. Counsel framed an issue for determination namely whether the plaintiff is entitled to the suit property by adverse possession. Counsel submitted that the 1<sup>st</sup> defendant is a purchaser for value since he claims to have bought the suit property as shown in PEXhibit 2. That the suit property has been a subject of dispute as revealed in **Oyugis SRM’s court criminal case No. 446 of 2004 and No.73 of 2005**. That this suit is res judicata by dint of the decision in Kisii HCCC No. 156 of 1993. That the plaintiff has not proved his claim as prescribed by **section 107 of the Evidence Act Chapter 80 Laws of Kenya**.

14) To fortify the submissions, counsel cited **Mbira-versus-Gachuhi (2002) 1 EALR, Samuel Miki Waweru-versus-Jane Richu Civil Appeal No. 122 of 2001, Kasuve-versus-Mwaani Investments Limited and 4 others (2004) eKLR, William Kabogo Gitau-versus-George Thuo and 2 others (2010) 1 KLR 526 and Palace Investment Ltd-versus-Geoffrey Kariuki Mwendwa and another (2015) eKLR** on adverse possession. Counsel further relied on **section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya. (The CPA herein), Benard Mugo Ndegwa-versus-James Nderitu Githae and 2 others (2010) eKLR and Attorney General and another-versus-ET (2012) eKLR** regarding the doctrine of res judicata.

#### **D. The gist of the 2<sup>nd</sup> defendant’s case.**

15) In a five (5) paragraphed replying affidavit sworn on **20<sup>th</sup> July 2021** and duly filed in court on **28<sup>th</sup> July 2021**, the 2<sup>nd</sup> defendant deposed in part that he remains the rightful and legal owner of the original property. That the plaintiff has failed to fulfill the principles required for proof of a claim for adverse possession as the plaintiff’s entry thereunto was by sale and the alleged possession has never been peaceful, among other things.

16) The 2<sup>nd</sup> defendant termed the Originating Summons farfetched, an afterthought, lacks merit and should be dismissed with costs. In support of the replying affidavit, he annexed thereto, copies of documents marked as “**LOA (1) (a) to “LOA 4”** including orders in Kisii HCCC No. 156 of 1993, letters and the title deed of the suit property in his name (**2<sup>nd</sup> DEXhibits 1 to 4**).

17) On **28<sup>th</sup> July 2021**, learned counsel for the 2<sup>nd</sup> defendant filed submissions dated **12<sup>th</sup> July 2021** providing the background of the matter, the summary of the plaintiff’s case, the 2<sup>nd</sup> defendant’s case in brief and identified the sole issue for determination namely whether the plaintiff has proved adverse possession claim against the defendants on a balance of probabilities. Counsel analysed the issue in the negative and submitted that the plaintiff’s claim has not satisfied the main elements of adverse possession thus, urged the court dismiss the claim with costs.

18) In support of the submissions, counsel relied on **Mbira and Samuel Miki Waweru cases (supra)** as regards adverse possession. Also, reliance was made on **Maweu-versus-Liu Ranching and Farming Cooperative Society (1985) KLR 430, Wambugu-versus-Njuguna (1983) KLR 173 and Muchanga Investment Limited-versus-Safaris Unlimited (Africa) Limited and 2 others (2009) eKLR**.

#### **E. Points for determination**

19) It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court’s determination; see **Great Lakes Transport Company (U) Ltd-versus-Kenya Revenue Authority (2009) KLR 720**.

20) Having considered the parties’ respective pleadings, affidavits and the rival submissions, I subscribe to the decision in the case of **Elijah O.L Opar-versus-Tobias Odhiambo Abach (2019) eKLR** at page 6 where the Court of Appeal held-

*“...evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without permission of Opar, and had continued in such possession for an uninterrupted period of at least 12 years thereby dispossessing Opar and extinguishing his right and title thereto. These are the ingredients of adverse possession.....” (Points emphasized)*

#### **F. Analysis and determination**

21) It is common baseline that the suit property is registered in the name of the 2<sup>nd</sup> defendant with effect from 21<sup>st</sup> December 2020 pursuant to sections 24, 25, 26, 30 and 108 of the Land Registration Act, 2016 (2012). (The LRA herein) as shown in PExhibit 1, 2<sup>nd</sup> defendant Exh 2 and 1<sup>st</sup> defendant Exhibit 4. Therefore, the suit property is registered in the name other than that of the plaintiff; see **Wilson Kazungu Katana and 101 others-versus-Salim Abdalla Bakshein and another (2015) eKLR** at page 7 where the Court of Appeal observed-

*“...First, the parcel of land must be registered in the name of a person other than the applicant.....”*

22) It is also common a ground that the suit property has been identified as pointed out in paragraphs 2 and 21 hereinabove: see the decision in case of **Githu-versus-Ndeete (1984) KLR 776**.

23) In the case of **Gatimu Kinguru-versus-Muya Gathangi (1976-80) KLR 317**, it was observed that a definite portion of land is an important and integral part of process of proving adverse possession claim.

24) Besides, rights and registration of the 2<sup>nd</sup> defendant as stated in paragraph 21 hereinabove can be challenged by way of adverse possession under section 28 (h) of the LRA; see also **Tayebali Adamji Alibhai-versus-Abdulhussin Adamji Alibhai (1938) 5 EACA 1 applied in Kimani Ruchine and another-versus-Swift Rutherford company Limited (1976-80) 1 KLR 1500**, among other authoritative pronouncements.

25) As regards entry into the suit property, this court is conscious of the principle of ‘Nec vi, nec clam, nec plecario’ (no force no secrecy, no evasion). The plaintiff asserted that he has possessed and occupied the suit property from the year 1968.

26) On grounds (iii) and (iv) of the Originating Summons alongside paragraph 3 of his supporting affidavit, the plaintiff’s father, Jabuya Guma acquired the suit property formerly the original property, by way of purchase from Weke Ongondo in the year 1968. This is revealed in an agreement (PExhibit 2).

27) In light of the plaintiff’s admission that his father purchased the suit property, adverse possession cannot arise. Indeed, it cannot co-exist with the purchasers’s interest as held in **Muchanga Investment Limited** case (supra).

28) In that scenario, the entry of the plaintiff into the suit property was consensual. By PExhibit 2, the said entry was by permitted by the vendor/owner as noted in the case of **Virginia Wanjiku Mwangi –versus- David Mwangi Jotham Kamau (2013) eKLR**.

29) On the issues of possession and occupation of the suit property for a period in excess of 12 years and dispossession of the 2<sup>nd</sup> defendant thereby, the plaintiff’s assertion is that he has been in continuous possession and occupation of the suit property since the year 1968 with the knowledge of the defendants. That his rights and or interests over the same are vindicated by section 28 of the LRA and merits registration accordingly.

30) It is the plaintiff’s claim that he has made substantial developments on the suit property including but not limited to continuous cultivation of it. That he has planted trees and crops thereon as revealed in the photographs (PExhibit 4) annexed to his affidavit in support of the Originating Summons.

31) It is trite law that possession can take different forms such as cultivation of the land in dispute; see **Kimani Ruchine case (supra)** cited in **Titus Ong’anga Nyachieo-versus-Martin Okioma Nyauma & 3 others (2017) eKLR**.

32) The 1<sup>st</sup> and 2<sup>nd</sup> defendants asserted that the plaintiff’s possession and occupation of the suit property has not been peaceful. That there have been interruptions thereon as demonstrated by 1<sup>st</sup> DExhibits 1 to 7 and 2<sup>nd</sup> Exhibits 1 to 3 (d).

33) Quite clearly, by filing of a suit, Kisii HCCC No. 156 of 1993 as shown in 1<sup>st</sup> DExhibit 3 and 2<sup>nd</sup> DExhibits 1(a) to (c) to recover the suit property by the 1<sup>st</sup> defendant being the registered proprietor at that time, would stop time from running for the purposes of section 38 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya; see **Ndatho-versus-Itumo and 2 others (2002) 2 KLR 637**.

34) The plaintiff also claimed that he was awarded the original property by way of PExhibit 5. However by Kisii HCCC No. 156 of 1993, the letter to the OCS Oyugis Police Station, p3 form, the charge sheet (1<sup>st</sup> DExhibits 3, 5, 6 and 7 respectively) coupled with 2<sup>nd</sup> DExhibits 1 (a) to 3(d), the plaintiff’s possession and occupation of the suit property has not been continuous and peaceful.

35) Notably, attempts at eviction as discerned in 1<sup>st</sup> DExhibit 5, interrupted adverse possession count down. No doubt, the possession must be unbroken and no any endeavours to interrupt it as I approve the decision of Miles J in **Wanyoike Gathure-vs-Beverly (1965) EA 514 at 518**.

36) The 1<sup>st</sup> defendant submitted that this suit is res judicata and it be dismissed with costs. He made reference to Kisii HCCC No. 156 of 1993 and cited section 7 of the CPA, **Benard Mugo Ndegwa and Attorney General Cases (supra)**.

37) In the **Blacks’s Law Dictionary (10<sup>th</sup> Edition) at page 1504**, the term “res judicata” means an issue that has been definitively settled by judicial decision. It’s three essential elements are provided thereunder thus;

a) An earlier decision on the issue

b) A final judgment on the merits , and

c) The involvement of the same parties or parties in privy with the original parties.

38) The 1<sup>st</sup> defendant was the plaintiff while Ogelo Jabuya under whom the plaintiff has mounted this suit, was the plaintiff in Kisii HCCC No. 156 of 1993. The dispute was determined finally by way of 1<sup>st</sup> Exhibits 3, 4 and 5 as read with 2<sup>nd</sup> DE Exhibits 1(a) and (b) and herein

39) So, the cardinal principle is that litigation has to come to end; **see Halsbury's Laws of England (4<sup>th</sup> Edition) volume 22 at page 273**

40) In **Civic Aviation Ltd –versus-Kenya Airways Ltd (Cruisair) Ltd (1978) eKLR**, Madan JA held that he who asserts must prove as stipulated in Sections 107 to 109 of the Evidence Act (supra). It is upon the plaintiff to prove adverse possession against the plaintiff's on a balance of probabilities as established in, inter alia, **Wilson Katana case** (supra). In the premises, the plaintiff has not proved his claim to the requisite standard and the defendants' case thwarts the claim.

41) A fortiori, the plaintiff's suit duly lodged by way of an Originating Summons dated **14<sup>th</sup> December 2020** and amended on **22<sup>nd</sup> January 2021**, be and is hereby dismissed.

42) By dint of the provision to section 27 (1) of the Civil Procedure Act (CPA), the costs of this suit shall be borne by the plaintiff.

**JUDGMENT DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 6TH DAY OF DECEMBER 2021.**

**G.M.A ONG'ONDO**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. H BUNDE LEARNED COUNSEL FOR THE PLAINTIFF.**

**MR. NGOGE HOLDING BRIEF FOR O.J BUNDE FOR 2ND DEFENDANT.**

**COURT ASSISTANT: OKELLO**

**G.M.A ONG'ONDO**

**JUDGE**