

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND COURT APPEAL NO. E026 OF**  
**2024**

**SAMWEL OTIENO**  
**OMORO.....APPELLANT**

**VERSUS**  
**TOM MBOYA**

**OCHURA.....RESPONDENT**  
*(Being an Appeal from the Judgment and Decree of Hon.  
S. O Ongeru (SPM) delivered in Oyugis PMELC Case No.  
E062 of 2022)*

**JUDGEMENT**

**1.** By way of Plaint dated 17<sup>th</sup> October 2022, the Respondent/Plaintiff sought the following orders in the trial court;

**1)The Honourable Court do issue an order for a permanent injunction against the Defendant barring him from construction of any structure on the suit property parcel number WEST KASIPUL/KODERA KARABACH/2345.**

**2)The Honourable court do issue an eviction order against the Defendant herein ordering to vacate the suit property.**

**3) The Honourable Court to issue an order compelling the Defendant to transfer the suit property Parcel Number WEST KASIPUL/KODERA KARABACH/2345 to the Plaintiff herein.**

**4) Costs of the suit.**

- 2.** In the plaint, the plaintiff pleaded that he was the son of Michael Ochura (deceased) who bought a portion of the parcel of land known as West Kasipul/Kodera Karabach/1 measuring 60 by 20 feet from the Defendant's father one Benson Juma Mwango. Further, that the Defendant sued the Plaintiff herein before the Migori ELC Court in Migori ELC case Number 783 of 2017 wherein he sought orders that the restriction which the Plaintiff had placed against the suit parcel claiming beneficial interest by virtue of a sale agreement between his late father and the Plaintiff's father be lifted.
- 3.** He pleaded that the Defendant invaded the suit property and started putting structures thereon despite the self-explanatory judgment. Further, that he recently learned that the Defendant subdivided the suit parcel into four other parcels being WEST KASIPUL/KODERA KARABACH/2343, 234,

2345 and 2346 respectively whereof the Plaintiff/Applicant portion is now title deed number WEST KASIPUL/KODERA KARABACH/2345. He prayed the court grant the orders as prayed.

4. In its judgment the court found that the Plaintiff had proved adverse possession of the suit parcel and recommended that the Plaintiff moves the courts appropriately to be registered of the owner of the said portion of land.
5. The Appellant filed a defence dated 28<sup>th</sup> October 2022 where he denied the allegations in the Plaint. He admitted the contents of paragraphs 4, 5 and 6 of the plaint and averred that for that reason the judge held that the restriction lodged against the title West Kasipul/Kodera-Karabach/1 should not be lifted until and unless the plaintiffs' claim of having acquired title by adverse possession has been heard and decided in another case. He stated that since the delivery of the said judgment in favour of the plaintiff, he has not filed any suit for the determination of whether he has acquired title thereto by adverse possession. He denied the allegation that Honourable Justice G.M.A. Ongondo declared that the

plaintiff had proved that he acquired title to the land by adverse possession.

6. He urged that the late Benson Juma Mwango his father who was a close friend of the plaintiff's father voluntarily and ex gratia gave him a small portion of the suit next to Ombek Market to erect a semi-permanent shop which later collapsed and the plaintiff's father ceased to possess the same. Further, that the Plaintiff mistakenly removed the caution he had placed on the land and since he had obtained a grant of letters of administration to the estate of Benson Juma Mwango, and was the registered proprietor, the title was closed and new numbers created on sub division. He prayed that the court dismiss the suit.

7. The matter then proceeded for full hearing

8. **PW1** was **Tom Mboya Ochuro**, the Plaintiff. He adopted his witness statement as evidence in chief and produced his list of documents.

9. During cross examination, he stated that his family has been in possession of the and for a long time. That his father died in 2013 and the defendant's father died in 2012. From the agreement it is indicated that he purchased a parcel but not

that he was given a small portion to build a house. He urged that the sale agreement was done in 1982 and the land had not been transferred to his father. He also stated that the adjudication was done when he was very young.

**10.** The Plaintiff closed his case and the defendant testified as the only witness for the defence.

**11. DW1** was **Samuel Otieno Omoro** who adopted his witness statement as evidence in chief. He also produced a list of documents as evidence and testified that he is the registered owner of the land that is already subdivided into 3 ha. He stated that he did not know that he was supposed to be evicted.

**12.** The defence closed its case and the parties filed submissions. Upon considering the testimonies and evidence tendered in court, the trial court entered judgement in favour of the plaintiff, ordering that the defendant transfer the suit property to the Plaintiff and issued an order of injunction against the defendant, barring him from constructing any structures. Additionally, the court issued an eviction order against the defendant.

**13.** Being dissatisfied with the judgement and decree, the Appellant instituted the present appeal vide a memorandum of Appeal dated 6<sup>th</sup> June 2024. The appeal is premised on the following grounds;

**1)The learned trial Magistrate misdirected himself on several matters of law and fact.**

**2)The learned trial Magistrate erred in law of procedure, practice and evidence in deciding on the issue of ownership of Land Parcel No. West Kasipul/Kodera-Karabach/2345 when no evidence has been adduced by the plaintiff or his witnesses to prove ownership.**

**3)The learned trial Magistrate erred in law in interpreting the finding by the trial Judge that the defendant in Migori ELC No. 783 of 2017 had demonstrated that he had an interest in the land and thus a right to lodge a restriction to mean that the said defendant had proved that he is the owner of the land and did not need any evidence to prove ownership.**

**4)The learned trial Magistrate erred in land law in holding that the plaintiff was capable of acquiring the title to the suit land by virtue of adverse possession when the same land was occupied by the late Michael Ochura with the consent of Benson Juma Mwango alias Omol Mwango either through a contract of sale of land or a friendly gift.**

**5)The learned trial Magistrate erred in law of evidence in deciding the case against the weight of evidence.**

**14.** The parties filed submissions on the appeal.

**Appellants' Submissions**

**15.** On grounds 1, 2 and 5 of the Appeal, Counsel submitted that Black's Law Dictionary 9<sup>th</sup> edition, page 1177 defines the term Obiter dictum as follows-

("something said in passing") A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). "

**16.** Counsel submitted that the primary purpose of pleadings is to clearly define the issues in a legal dispute, ensuring

both parties understand the claims and defences being made and to provide a frame work for the trial. Essentially pleadings act as a structured way to present a party's case in writing, outlining the fact, legal basis and relief sought. He cited the case of World Explorers Safaris Limited vs. Cosmopolitan Travel Limited & Another (2021) eKLR in this regard. Counsel further submitted that it is generally accepted that the essence in a decision is the ratio decidendi of the case and not every observation found in the case. A case is only an authority for what it actually decides and not what logically follows from it.

**17.** Counsel urged that in ELC Land Case No. 783 of 2017 (O.S) the plaintiff sued so that the restriction lodged against Land Parcel No. W. Kasipul/Kadera-Karabach/1 could be lifted. The defendant only gave evidence to show that he had a valid claim to justify the restriction being lodged. No evidence was ever given to prove acquisition by adverse possession nor was the defendant subjected to cross-examination to verify his allegations. The ratio decidendi of the judgment of Justice G.M.A Ongodo J is in paragraph 24 of the judgment which he reproduced.

**18.** He submitted that it is on the basis of the above finding that Oyugis Land Case No.62 of 2022 was filed by Tom Mboya Ochura, i.e. to try to enforce the alleged overriding interest. In fact it was at that trial or hearing that the respondent should have adduced evidence to prove that he or his father had acquired the land by adverse possession but he failed to adduce any such evidence assuming that the observations made by the court in the Migori case awarded to him the land.

**19.** On Grounds 3 and 4, Counsel submitted that in Migori ELC Land Case No. 783 of 2018 other than the vague allegations made in the affidavit sworn on the 12<sup>th</sup> March 2019, no court would actually reach a conclusion that one had acquired land by adverse possession. No evidence was adduced that the respondent or anybody in his family continuously and peacefully occupied the said plot allegedly purchased by the respondent's father. There is further no proof that he was still in occupation of the same land. All these ingredients of a claim for acquisition of title by adverse possession must be proved in a full trial.

**20.** Further, that the judge at Migori, in an effort to prove that the defendant (now respondent) had a valid basis to lodge the restriction, went beyond his mandate by declaring that the defendant had acquired title by adverse possession when there was no evidence adduced before him to prove so.

**21.** Counsel submitted that there is no proof of the alleged sale contract or evidence of any occupation of the same land and no explanation is given as to why such a long period elapsed before the allegedly sold portion of land was not transferred to the alleged buyer. Both parties to the alleged contract of sale were dead and therefore there are several questions to be answered before one concludes that the property was acquired by adverse possession. The evidence adduced at the trial in the Oyugis case is grossly wanting and proves nothing as acquisition by adverse possession is concerned. He further urged that there was no proper trial to determine the issue of acquisition by adverse possession and the decision of the trial magistrate should be set aside.

### **Respondents' Submissions**

**22.** Counsel for the respondent laid down the summary of the facts of the case before the trial court and delved into the

issues for determination. On whether the trial court misinterpreted the judgment of the Migori ELC 783 of 2017, Counsel urged that once the learned judge established that the Respondent herein had an overriding interest in the suit property and even advised that the Respondent proceed and enforce the same the Respondent was to proceed accordingly and enforce the right.

**23.** Counsel urged that the Respondent rightfully filed the Oyugis ELC 062 of 2024 seeking the orders of permanent injunction, an eviction order and an order compelling the Appellant to transfer the land to the Respondent. The Respondent was not to belabour again to prove the existence of such an overriding interest and/or an issue of Ownership yet the same had already been decided over by the Migori ELC Court. He urged that the Oyugis Trial court didn't err by upholding the findings of the Migori ELC court and proceeding to give orders of enforcement of the rights.

### **Analysis and Determination**

**24.** The following issues arise for determination; Whether the trial court erred in entering judgement in favour of the Plaintiff

**25.** Before delving into the issue for determination, I must first state the duty of this court as an appellate court. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”**

**26.** In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the**

**conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

**27.** The Respondent sought to have the court issue an injunction against the appellant and eviction orders premised on the decision in Migori Environment and Land Case No. 783 of 2017. In the said suit between the parties herein, the subject matter was West/Kasipul/Kodera Karabach-1. The court found that the Respondent herein, had proved his overriding interests in the suit land and entered judgement in his favour. The Respondent then institute the suit in the trial court in order to enforce the order of the Environment and Land Court. Consequently, the trial court made the orders in favour of the Respondent prompting the present appeal.

**28.** It is my considered view that the Environment and Land Court conclusively determined the issue of ownership in the previous matter. Therefore, the trial courts’ decision was merely a step towards enforcing the decision of the court. From the evidence tendered, including the certificate and official search for the suit land, it was proved that the land known as WEST KASIPUL/KODERA KARABACH/1 was subdivided into **WEST KASIPUL/KODERA KARABACH/2343,**

**2344, 2345** and **2346**. Therefore, the order of the trial court was in no way factually or legally inaccurate.

**29.** Additionally, as no appeal has been preferred against the decision of the court in Environment and Land Case No. 783 of 2017, the appellant cannot seek to challenge the interpretation of the decision therein in this forum as the court that made said decision was a court of competent and concurrent jurisdiction and therefore, any challenge to the decision must be by way of appeal to the Court of Appeal.

**30.** I have had the opportunity to peruse the judgement that was delivered and at paragraph 24 of the decision the court held as follows;

**[24] In view of the foregoing analysis and borrowing from the cited authorities, it is the finding of this court that the defendant has demonstrated that he has the aforestated overriding interests over the suit land. His equitable claim therein is merited in the circumstances. Further, he is at liberty to enforce the overriding interests against the plaintiff. To that end, since the defendant is entitled to restrict**

**the dealings in the title of the plaintiff in respect of the suit the plaintiff's case has not been proved a balance of probabilities.**

**31.** The decision of the court was not clothed in any complex language and does not require much interpretation. A clear reading of the same reveals that the respondent herein was declared to have overriding interests on the suit land to the detriment of the Appellant. The declaration that he had an overriding interest should be interpreted to mean that he has proprietary rights to the suit land. The trial court suit was for, I reiterate, the purposes of enforcing the decision and obtaining registration of title to the suit land.

**32.** In the premises, I find that the Appeal lacks merit and the same is dismissed with costs to the Respondent.

**Judgment dated, signed and delivered virtually via the Teams Platform this 8<sup>TH</sup> day of December 2025.**

**Hon. Dr. *iur* Nyagaka**

**JUDGE**

**In the presence of,**

Court Assistant: Mr. Adongo P.

Ms. Oyala for G. S. Okoth for the appellants

Ms. Kisaka advocate for the respondents (absent)