



Akoth v Obiero (Sued as the legal representative/administrator of the Estate of Gabriel Obiero Onyango-Deceased) (Environment & Land Case 28 of 2021) [2024] KEELC 384 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 384 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT & LAND CASE 28 OF 2021

GMA ONGONDO, J

JANUARY 31, 2024

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CHAPTER 22, LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT.

AND

IN THE MATTER OF: CLAIM FOR ADVERSE POSSESSION/PRESCRIPTION

AND

IN THE MATTER OF SECTION 28 OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR. NO WEST KASIPUL/KASIMBA 167

BETWEEN

KENNEDY OKUMU AKOTH PLAINTIFF

AND

**PHILIP OTIENO OBIERO (SUED AS THE LEGAL REPRESENTATIVE/
ADMINISTRATOR OF THE ESTATE OF GABRIEL OBIERO ONYANGO-
DECEASED) DEFENDANT**

JUDGMENT

A. Introduction

1. The property in the instant dispute is land reference number West Kasipul Kamuma/167 measuring approximately Zero Decimal Nine (0.9) Acres in area (The suit property). The same is contained in Registry Map Sheet Number 1 and located within Homa Bay County.



2. The plaintiff is represented by the firm of Oguttu Mboya, Ochwal and Partners Advocates.
3. The defendant appears in person in this suit.
4. Originally, this suit was lodged at Migori Environment and Land Court. On 5th October 2021, it was transferred to this court for hearing and determination in the spirit of access to justice under Articles 6 (3) and 48 of the Constitution of Kenya, 2010.

B. The Plaintiff's Case

5. The plaintiff generated this suit by way of an originating summons dated 20th September 2019 seeking the following orders;
 - a. Declaration that the Defendant's right to recover the entire suit property is barred under the Limitations of Actions Act Cap 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 entire of the suit property for a period of more than 29 years and thus exceeding the statutory timeline for recovery of immovable property.
 - b. There be an Order that the plaintiff be registered as the proprietor of the entire suit property in place of the defendant and/or the register thereof be rectified to reflect the plaintiff as the lawful and legitimate owner thereof.
 - c. The Honourable court be pleased to order and/or direct the defendant herein to execute, the applicant for Land control Board consent, the Transfer Instrument and/or such other transfer instruments, as may be necessary and/or appropriate, to facilitate the transfer and registration of the suit property in the name of the plaintiff.
 - d. In the alternative and without prejudice to prayer 3 hereof, the Deputy Registrar/Executive Officer of the Honourable Court, be mandated and/or authorized to execute the transfer instrument/documents, touching on and/or concerning the suit property, to facilitate the transfer in respect of the suit property.
 - e. There be granted an Order restraining the Defendant by himself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the suit property and/or any portion thereof, in any manner whatsoever and howsoever.
 - f. Costs of this Originating Summons be borne by the defendant.
 - g. Such further and/or others be made as the court may deem fit and expedient, in the circumstances of this case.
6. The originating summons is premised upon the grounds on the face of the same and the plaintiff's supporting affidavit of 38 paragraphs sworn on even date and annexed documents marked as "KOA 1" to KOA 6 (c) which include; a copy of green card (PExhibit 1), sale of land agreement (PExhibit 5) and photographs (PExhibit 9) of the suit property.
7. In summary, the plaintiff claims that on or about 6th June 1990, one Gabriel Obiero Onyango (Deceased) sold the entire suit property by way of PExhibit 5 to him. That he paid full purchase price of Kshs. 680,000/= to the deceased who acknowledged receipt of the payment and covenanted to procure the requisite land control board consent but allowed the plaintiff to possess the suit property. That the plaintiff fenced off the entire suit property which he has cultivated and erected his home thereon. That the deceased was unable to obtain land control consent thereof. That the plaintiff has been in



possession of the suit property for 29 years peacefully and without any interference hence provoking this suit.

8. The plaintiff (PW1) relied on his statement dated 20th September 2019 and filed on 4th November 2019 and list of documents of even date S/Nos. 1 to 7, 10 and 11 (PExhibits 1 to 9) as part of his testimony. He stated that the deceased sold the suit property to him in 1990 at Kshs. 680,000/= and he took possession of it immediately. That he then fenced the whole of it, planted trees, fixed a gate and lives thereon. That the deceased died soon after sale of the suit property.
9. PW2 was Pius Odoyo Ayugi, Assistant chief of Kasimba Sub Location in Homa Bay County. This witness stated that he wrote a letter dated 17th November 2017 for a restriction over the suit property (PExhibit 6). He told the court that PW1 planted trees, cultivates maize, built a house and lives thereon.
10. The plaintiff's counsel filed submissions dated 7th July 2023 and summed up the parties' respective pleadings and framed issues, inter alia, whether the plaintiff has proved this case on a balance of probability. Counsel urged the court to grant the orders sought in the originating summons and cited section 7 of the *Land Act*, 2016 (2012), sections 7, 17, 18 and 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya alongside authoritative pronouncements including *Mbugua Njuguna v Eliah Wanyoike & another* (2004) eKLR *Githu v Ndeete* (1984) KLR 776 on adverse possession, to fortify the submissions.

C. The Defendant's Case

11. The defendant filed a replying affidavit of twenty paragraphs sworn on 10th December 2019 and the annexed document marked as "POO-1" being death certificate of the deceased who was his father. He averred that the alleged sale agreement (PExhibit 5) is fake. He denied the plaintiff's claim and termed the suit property family land.
12. Also, the defendant averred that the plaintiff started construction of his homestead on the suit property in the year 2011. That the plaintiff did not carry out cultivation thereon. That the plaintiff's possession and occupation of the same has not been peaceful as he (the defendant) has always tried to evict him from the suit property. He implored the court to dismiss the suit with costs.
13. The defendant (DW1) relied on his Replying Affidavit and Death certificate (DExhibit 1) as part of his evidence. He stated in part the plaintiff is out to dislodge him from the suit property which he inherited from the deceased. Further, this witness relied on P Exhibit 5 which is also DExhibit 2, title deed (DExhibit 3) and photos (D Exhibit 6) in his evidence.
14. In his submissions, the respondent urged the court to withdraw the plaintiff's case with costs to him. He referred to Oyugis Law courts succession cause No. 54 of 2012 and that he is legally registered as the owner of the suit property. He cited section 26 the *Land Registration Act*, 2016 (2012) and termed PExhibit 5, fake. To reinforce his submissions, he relied on the case of *Margret Njeri Wachira v Eliud Waweru Njenga* (2018) eKLR, among others.

D. Issues for Determination

15. Order 15 of the *Civil Procedure Rules*, 2010 provides for;
 - a. Framing of issues and
 - b. Materials from which issues may be framed.



16. It is settled law that issues 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 v Kenya Revenue Authority* (2009) KLR 720.
17. In the foregone, the issues for determination herein are compressed to whether the plaintiff has established his claim against the defendant in line with the decision in the case of *Wilson Kazungu Katana & 101 others v Salim Abdallah Bakshwein and another* (2015) eKLR concerning adverse possession requirements namely;
 - a. The property 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.

E. Analysis and Determination.

18. As regards the first requirement, the suit property is registered in the name of the defendant with effect from 22nd February 2013 as shown in PExhibits 1, 2 and 4 as well as DExhibit 3. The title deed thereof was issued in his name on 3rd April, 2013 as disclosed in PExhibit 2..
19. Initially, the proprietor of the suit property was the deceased. It was registered in his name on 24th July 1968 as per PExhibit 3.
20. In *Wainaina v Murai and others* (1976-80) 1KLR 283 at 289/90, it was noted;

“The land in question is registered under the Registered Land Act cited in section 37.....”
21. It is therefore, crystal clear that the suit property is registered in the name of the defendant under the *Registered Land Act* Chapter 300 Laws of Kenya-Repealed. The same is not in the name of the plaintiff as noted in *Wilson Katana* case (*supra*).
22. On the second requirement, the plaintiff stated that he has been living on the suit property peacefully, uninterruptedly for 29 years. He produced photographs (PExhibit 9) to inform his assertion thereof.
23. PW2 told the court that he has been assistant chief of Kasimba Sub Location for over 20 years. That PW1 resides on the suit property. Under cross examination, he stated;

“.....I found him on the suit land when I was appointed as assistant chief. It is over 20 years that he has lived on the suit land together with his wife and children. His house is old and he cultivates maize on the suit land.....”
24. During cross examination. DW1 stated thus;

“PW1 is in occupation of the suit land.....”
25. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Kimani Ruchine and another v Swift Rutherford Company Ltd and another* (1976-80) 1 KLR 1500.



26. PExhibit 9 shows a metal gate and huge tree growing on the suit property. This proves that the plaintiff is in open and exclusive possession of the property in an adverse manner to the title of the proprietor namely the defendant.
27. On the third requirement, it is evident from the testimonies of PW1 inclusive of PExhibit 9 as affirmed by PW2 and DW1 that PW1 lives on the suit property. PW1 and PW2 were succinct that the plaintiff's occupation of it is in excess of 20 years.
28. In adverse possession claim, dispossession of owner of land occurs when the applicant proves that he or she has exclusive uninterrupted possession of the same for more than 12 years; see *Salim v Boyd* (1971) EA 550
29. It is important to note that the plaintiff's claim is over the entire suit property. That he has been in exclusive continuous and peaceful possession of it in excess of twelve years; see also *Gatimu Kinguru v Muya Gatangi* (1976-80) 1 KLR 317.
30. In the instant case, it is evident that the plaintiff has ousted the defendant from the suit property. This is followed by adverse possession, occupation, development as captured in PExhibit 9; see Kinguru case (*supra*).
31. It is thus, finding of this court that the plaintiff has proved his claim against the defendant on a balance of probabilities. He is deserving of the orders sought in the originating summons as the defendant's case fails.
32. The upshot is that judgment is hereby entered for the plaintiff against the defendant in terms of the orders sought on the face of the originating summons dated 20th September 2019 as stated in paragraph 5(a) to (f) hereinabove.
33. For clarity, prayer number (e) as stated in paragraphs 5(e) and 32 hereinabove and granted herein is a permanent injunction in light of the character of this suit and being guided by sections 3 and 13(7) (a) of the *Environment and Land court Act*, 2015(2011).

DATED AND DELIVERED AT HOMA BAY THIS 31ST DAY OF JANUARY 2024

G. M. A ONG'ONDO

JUDGE

Present

1. Mr. Stanley Wafula learned counsel for the Plaintiff
2. Defendant in person
3. Luanga, court, assistant

