



K'aol v Oloo (Sued as the Legal Representative / Administrator of the Estate of Isaya Oloo alias Oloo Oyoo - Deceased) & another (Environmental and Land Originating Summons 12 of 2021) [2024] KEELC 84 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 84 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 12 OF 2021
GMA ONGONDO, J
JANUARY 24, 2024
FORMERLY MIGORI ELC NO. E032 OF 2021 (OS)**

BETWEEN

CORNEY PHILEMON AIMO K'AOL PLAINTIFF

AND

**HELLENA ADOYO OLOO (SUED AS THE LEGAL REPRESENTATIVE /
ADMINISTRATOR OF THE ESTATE OF ISAYA OLOO ALIAS OLOO OYOO -
DECEASED) 1ST DEFENDANT**

KENNEDY OTIENO OLOO 2ND DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit concerns land reference number Central Kasipul/Kachieng/619 measuring approximately four decimal five acres (4.5 acres) in area. The same is contained in Registry Index Map Sheet No. 9 and located within Homa Bay County.
2. The plaintiff is represented by the firm of Oguttu Mboya, Ochwal and Partners Advocates.
3. The defendants are represented by the firm of Bana and Company Advocates.
4. Initially, the suit was lodged at Migori Environment and Land Court before it was transferred to this court on 28th September 2019, for hearing and determination in the spirit of Articles 6(3), 48 and 159 (2) (b) and (e) of the Constitution of Kenya, 2010.



B. Summary of the Parties' Respective Cases

5. On 15th December 2021, the plaintiff, through his Advocates, filed the present suit by way of an amended Originating Summons dated 14th December 2021. The same was brought pursuant to Order 37 Rules 1, 3, 4, 7 and 15 of the Civil Procedure Rules, 2010 and Sections 37 and 38 of the Limitations of Actions Act Chapter 22 Laws of Kenya and Section 28 of the Land Registration Act, 2016 (2012) seeking the orders *infra*:
 - a. Declaration that the defendants' right to recover a portion of the suit land measuring 2.25 acres only is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya, and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the portion of the suit land for a period of 20 years and thus exceeding the statutory timeline for recovery of immoveable property.
 - b. There be an order that the plaintiff be registered as the proprietor of the portion of the suit land measuring 2.25 acres in place of the 2nd defendant who currently holds title to the suit land and/or the register thereof be rectified to reflect the plaintiff as the lawful and legitimate owner thereof.
 - c. There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of a portion measuring 2.25 acres out of the suit land, in any manner whatsoever and/or howsoever.
 - d. The Deputy Registrar and/or the Executive Officer of the honourable high court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the portion measuring 2.25 acres out of the suit land in favour of the plaintiff, in the event of default by the 2nd defendant to execute the necessary transfer instruments.
 - e. Costs of this originating summons be borne by the defendants.
 - f. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
6. The originating summons is anchored on a thirty-four (34) paragraphed supporting affidavit of the plaintiff sworn on even date and annexed thereto. The plaintiff's lamentation is that vide a land sale agreement dated 30th January 2001, he purchased a portion of the suit land measuring 2.25 acres in area from the initial registered owner, Isaya Oyoo Oloo (deceased), after conducting due diligence thereto. That he paid the full purchase price of kshs.280,000/- and thereafter took possession of the said portion of the suit land. That despite obtaining the consent of the Land Control Board to transfer the purchased portion, the deceased died prior to executing the transfer forms. That following his demise, the 1st defendant applied for and obtained grant of letters of administration to the estate of the deceased, thereby causing the suit land to be transferred and registered in her name. The plaintiff avers that despite lodging a caution against the title of the suit land and during the pendency of the instant suit, the 1st defendant in total disregard to the court orders for maintenance of status quo issued herein on 21st July 2021, caused the suit land to be transferred and registered in the name of the 2nd defendant.
7. The plaintiff avers that he has been in open and continuous occupation of the portion of the suit land for a duration exceeding 12 years. That the defendants' interests over the suit land have ceased and the same ought to be transferred and registered in his name.



8. PW1, Corney Philemon Aimo K'Aol, relied on his statement dated 14th July 2021 which was adopted as part of his evidence as well as bundle of documents dated 14th July 2021, serial numbers 1 to 15 to wit a copy of the green card in respect to the suit land, a copy of the land sale agreement between the plaintiff and Isaya Oyoo Oloo, a copy of the application for consent of the Land Control Board, a copy of the death certificate of Isaya Oyoo Oloo, a copy of letter by area Chief- East Kamagak Location dated 23rd March 2012, a copy of certificate of official search in respect of the suit land dated 17th October 2017, a copy of the revenue receipt dated 17th October 2017, a copy of the Kenya Gazette Notice No. 12230 in respect of Oyugis PMCC Succession Cause No. 223 of 2017, a copy of the grant of letters of administration issued in Oyugis PMCC Succession Cause No. 223 of 2017, a copy of certificate of official search in respect of the suit land dated 17th September 2020, a copy of the caution and statutory declaration, a copy of the revenue receipt dated 24th September 2017, a copy of letter by the area Chief- East Kamagak Location dated 9th October 2020, a copy of certificate of official search in respect of the suit land dated 28th June 2021 and a bundle of photographs (PExhibits 1 to 15 respectively).
9. During cross-examination, PW1 admitted that both the 1st and 2nd defendants, who are the wife and son of the deceased respectively, stay on a portion of the suit land. That succession done in respect to the estate of the deceased, was gazetted.
10. PW2, Philip Mbori Chuonyo, relied on his statement dated 25th May 2022 which was adopted as part of his evidence. He testified that he witnessed the execution of PExhibit 2, between the deceased and PW1. That the plaintiff took possession of the portion sold to him in 2001, planted trees thereon and cultivates the same to date. He averred that the defendants occupy a portion of the suit land which is distinct from the portion sold to the plaintiff herein. That the defendants have never instituted legal proceedings against the plaintiff regarding the suit land.
11. On cross-examination, PW2 stated that although the plaintiff does not live on the suit land, his son has built a house thereon as exhibited in PExhibit 15.
12. Tobias Odera Nyamngutu, a former Assistant Chief, testified as PW3 relied on his statement dated 25th May 2022 which was adopted as part of his evidence. He stated that the plaintiff carries out farming activities on his portion of the suit land and has been doing so for 22 years.
13. The defendants opposed the claim vide a replying affidavit sworn on 23rd February 2022 by the 1st defendant herein who deposed, *inter alia*, that the plaintiff and her deceased husband entered into a sale of land agreement. That however, the former failed to complete payment of the purchase price to the latter.
14. DW1, Hellena Adoyo Oloo (the 1st defendant), testified on 26th September 2023 and relied on her Replying Affidavit sworn on 23rd February 2022, which was adopted as part of her evidence.
15. In cross-examination, DW1 conceded that indeed the plaintiff purchased the portion of the suit land from the deceased. She, however, stated that the plaintiff failed to pay the agreed purchase price thus, she wishes to have the said portion returned to her. She admitted that the plaintiff cultivates the said portion and has built a house for his son thereon.
16. Learned counsel for the plaintiff filed submissions dated 12th October 2023 and identified a single issue for determination, to wit, whether the plaintiff has proved his case on a balance of probabilities. Counsel submitted that the instant claim is for adverse possession and not for enforcement of the sale agreement between the plaintiff and the deceased. That therefore, the 1st defendant's allegation that the plaintiff did not complete payment of the purchase price is immaterial in the circumstances. That the burden of proof has been discharged by the plaintiff and the suit ought to be allowed as prayed.



Reliance was placed on Sections 7, 17, 18 and 38 of the *Limitation of Actions Act*, as well as the cases of *Mbugua Njuguna v Elijah Wanyoike and Another* (2004) eKLR and *James Muniu Mucheru v National Bank of Kenya Limited* (2019) eKLR, to buttress the submissions.

17. Learned counsel for the defendants filed submissions dated 20th November 2023 on 5th December 2023, urging the court to dismiss the plaintiff's claim with costs. Counsel submitted that the plaintiff being a purchaser whose possession is based on a contract of sale could only justify a claim for adverse possession if the contract of sale had been repudiated or rescinded or upon payment of the last installment of the purchase price. That the foregoing not being the obtaining situation, the plaintiff's claim ought to fail. Counsel relied on various authorities to fortify the submissions, including the case of *Wambugu v Njuguna* (1983) KLR 172.

C. Issues for Determination

18. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd v Falcon Grounds Ltd* (2000) 2 EA 385.
19. I have duly considered the entire originating summons, the testimony of PW1 to PW3 and the rival submissions as well as the testimony of DW1 and the defendants' submissions. So, the issues for determination are as captured in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshein and another* (2015) eKLR that adverse possession dictates thus;
- a. The parcel of land 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.

D. Discussion and Determination

20. It must be noted that the plaintiff's claim is for a portion of land reference number Kasipul/Kachieng/619 measuring approximately two decimal two five acres (2.25 acres) in area. Therefore, the plaintiff's claim is over a definite portion of land; see *Muthuita v Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
21. On the issue of registration, PW1 stated that the suit land is registered in the name of the 2nd defendant herein. He produced in evidence, a copy of certificate of official search for the disputed portion of the suit land dated 6th December 2021 which revealed that the 2nd defendant is the proprietor of the suit land with effect from 19th October, 2021.
22. As regards open and exclusive possession of the suit parcels of land, PW1 testified that he took possession of the portion of the suit land in 2001, planted trees thereon and cultivates the same to date. That his son has built a house on the portion.
23. DW1 admitted that the plaintiff has been cultivating the portion claimed. She stated thus:
- “...he cultivates the portion of land season in season out for the time of purchase...”
24. It is settled law that possession can take different forms such as cultivation; see *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma and 3 others* (2017) eKLR.



25. Regarding the third dictate, PW1 stated that he took possession of the portion of the suit land in 2001 and occupies the same to date. The same was corroborated by the testimonies of PW2 and PW3.
26. DW1 admitted that the plaintiff has been cultivating the portion claimed since purchase. That he has built a house for his son thereon. She stated that:

“...he cultivates the portion of land season in season out for the time of purchase. His son stays on the portion of land. PW1 built a house for his son thereon...” (Emphasis laid)
27. Clearly, no sufficient evidence was adduced to controvert the plaintiff’s assertion that he entered upon the suit land in 2001. That is a period in excess of 12 years. Indeed, the defendants have never issued an eviction notice against the plaintiff over the suit land.
28. It is my considered view that the plaintiff has demonstrated that he has been in peaceful and continuous enjoyment and use of a portion of land reference number Kasipul/Kachieng/619 measuring approximately two decimal two five acres (2.25 acres) in area in excess of twelve years. The defendants have been dispossessed thereby; see *Halsbury’s Laws of England* 4th Edition Volume 28.
29. Notably, it is evident that the deceased and the plaintiff entered into a sale agreement dated 30th January 2001 to purchase a portion of the suit land measuring 2.25 acres in area. The evidence adduced shows that the plaintiff paid the full purchase price of Kshs.280,000/- and thereafter took possession of the said portion of the suit land. So, the said sale was valid and enforceable by virtue of equitable estoppel and constructive trust; see *William Kipsoi Sigei v Kipkoech Arusei* (2019) eKLR.
30. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya provides that he who alleges must prove; see also *Wilson Kazungu Katana case* (*supra*).
31. In *Kirugi and another v Kabiya and 3 others* (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities.
32. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendants on a balance of probabilities. Therefore, the plaintiff is entitled to the orders sought in the originating summons.
33. Accordingly, I enter judgment for the plaintiff against the defendants in terms of orders 1, 2, 3, 4 and 5 sought on the face of the Originating summons and as stated in paragraph 5 (a), (b), (c), (d) and (e) hereinabove.
34. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 24TH DAY OF JANUARY 2024.

G.M.A ONG’ONDO

JUDGE

Present

Mr. Wafula, Learned Counsel for the plaintiff

Mr. Jack Otieno holding brief for Mr. Bana, Learned Counsel for the defendants

Defendant

Mutiva, Court Assistant

