



**Oloo v Onyango (Environment & Land Case 58 of 2021)
[2024] KEELC 1045 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 58 OF 2021
GMA ONGONDO, J
FEBRUARY 28, 2024**

BETWEEN

JOHN OUMA OLOO PLAINTIFF

AND

JONATHAN OBEL ONYANGO DEFENDANT

JUDGMENT

1. On 15th July 2020, the plaintiff, John Ouma Oloo, who was acting in person and currently represented by Quinter Adoyo and Company Advocates, initiated the instant suit by way of an Originating Summons dated 14th July 2020, pursuant to Order 37 Rules 7 and 14 of the *Civil Procedure Rules*, 2010 and Sections 7 and 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. He is seeking the orders infra:
 - a. A declaration that the defendant’s right to recover the whole of land parcel numbers West Nyokal/Kanyikela/1390 and 1391 measuring 2.0 Ha and 2.03 Ha in area respectively (the 1st and 2nd suit parcels of land respectively herein) is barred under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in possession and use for a period exceeding seventeen (17) years.
 - b. The plaintiff to be registered as the proprietor of the whole of the 1st and 2nd suit parcels of land.
 - c. The defendant be ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate transfer and registration of the 1st and 2nd suit parcels of land in the name of the plaintiff, and in default the Deputy Registrar of this honourable court be at liberty to execute the transfer instruments in favour of the plaintiff.



- d. An order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession, enjoyment, cultivation and occupation of the 1st and 2nd suit parcels of land in any manner whatsoever and howsoever.
 - e. The costs of this originating summons to be borne by the defendant.
 - f. Such other or further orders as the court may deem fit and just to grant in the circumstances.
2. The originating summons is anchored on grounds (a) to (r) on the face thereof and a seventeen (17) paragraphed supporting affidavit of the plaintiff sworn on even date. The plaintiff deposed, inter alia, that the 1st and 2nd suit parcels of land constitute ancestral land and were previously held by his grandfather one Eliazar Agoyo (deceased 1) and father, Elisafan Oloo Agoyo (deceased 2). That he has been in open, quiet and peaceful use of the 1st and 2nd suit parcels of land since 2003, a period of about 17 years. That he cultivates the said parcels of land by planting sugarcane, maize, vegetables from time to time.
 3. Further, the plaintiff stated that it was only in 2020 when he conducted an official search on the 1st and 2nd suit parcels of land and realized that they are registered in the name of the defendant who has never occupied or taken possession of the same. Thus, he urged the court to grant the orders sought in the originating summons.
 4. PW1, John Ouma Oloo, relied on the supporting affidavit filed herein, which was adopted as part of his testimony. He also relied on his list of documents dated 14th July 2020 serial numbers 1, 2, 3 and 4, to wit, a copy of certificate of official search for the 1st suit parcel of land, a copy of certificate of official search for the 2nd suit parcel of land, photographs of crops grown on the said parcels of land and a letter from the Ministry of Lands and Physical Planning dated 24th June 2019 (PExhibits 1, 2, 3(a) to (e) and 4 respectively). He stated, inter alia, that the defendant is his cousin and neighbor who stays about 500 metres from the 1st and 2nd suit parcels of land.
 5. In cross-examination, PW1 stated that he was not aware that his late father, deceased 2, had sold the 1st and 2nd suit parcels of land. That according to the copies of official search certificates availed herein, the defendant got registered as proprietor of the 1st and 2nd suit parcels of land in 2008 and 2014 respectively.
 6. PW2, Nelson Ochieng Adongo, relied on his statement dated 14th July 2020, which was adopted as part of his evidence. During cross-examination, he admitted that he did not have any evidence to show that PW1 has been cultivating the 1st and 2nd suit parcels of land since 2003.
 7. Charles Agoyo Oluoch (PW3) relied on the originating summons and his statement dated 14th July 2021, which were adopted as part of his testimony. He stated in part that he cultivates the mother title; L.R. No. West Nyokal/Kanyikela/1166. On cross-examination, he stated that he could not tell if the mother title belonged to deceased 2 and whether the same was subdivided giving rise to the 1st and 2nd suit parcels of land herein, which were subsequently sold.
 8. On 17th August 2020, the defendant, through G. S. Okoth and Company Advocates, filed a replying affidavit sworn on 12th August 2020 whereby he opposed the claim. He deposed, inter alia, that the plaintiff trespassed onto the 1st and 2nd suit parcels of land in 2014. That therefore, the prescribed statutory period of 12 years for adverse possession has not lapsed and the claim for adverse possession is untenable.



9. DW1, Jonathan Obel Onyango, relied on his statement dated 18th August 2020 and replying affidavit sworn on 12th August 2020, which were adopted as part of his evidence. He also relied on the documents annexed to the replying affidavit and marked as “JO-1A to 3” (DExhibits 1A to 3 respectively). In cross-examination, he stated that he purchased the 1st suit parcel of land from deceased 2 in 1992. That he bought the second suit parcel of land herein, in 2014 from his cousin, one Jared Owalo Odundo (deceased 3). That he has been utilizing the 1st and 2nd suit parcels of land, grazing his cattle and cultivating maize thereon. He admitted that he did not have an occurrence book number to show that he reported the trespass by the plaintiff to the relevant authorities.
10. Caleb Otieno Anyango, a Surveyor from the County Survey Office, testified as DW2. He stated that he visited the 1st and 2nd suit parcels of land on 19th January 2023 pursuant to court orders issued on 17th May 2022. He produced in evidence a report dated 17th March 2023 thereto (DExhibit 4). He stated that the plaintiff utilizes the 1st and 2nd suit parcels of land as well as the mother title.
11. During cross-examination, he stated that the Land Registrar was present during the survey exercise. He confirmed the acreage of the 1st and 2nd suit parcels of land as 2.00 Ha and 2.03 Ha respectively. He admitted that he did not know for how long PW1 had been utilizing the said suit parcels herein.
12. DW3, Samwel Ogongo Odhiambo, relied on his statement dated 18th August 2020, which the court adopted as part of his evidence. He urged the court to direct that the three parcels, including the 1st and 2nd suit parcels of land, be registered in the name of deceased 2. That the plaintiff to own the 1st and 2nd suit parcels of land herein. That the defendant had been using the 1st and 2nd suit parcels of land until the plaintiff encroached onto the same.
13. In cross-examination, he stated that he is the plaintiff’s brother and averred that the plaintiff is currently the one using the suit parcels of land.
14. Samwel Odede Okello (DW4) relied on his statement dated 18th August 2020, which was adopted as part of his testimony. He stated, inter alia, that the defendant had been using the 1st and 2nd suit parcels of land until the plaintiff encroached onto the same and started using them.
15. During cross-examination, DW4 stated that the plaintiff moved onto the 1st and 2nd suit parcels of land in 2014. That a dispute arose between the parties, which was adjudicated by the area chief, Elikana Agola, who passed on in 2021.
16. The plaintiff’s counsel filed submissions dated 29th January 2022 and identified twin issues for determination thus: whether the plaintiff is entitled to ownership through adverse possession and whether the prayers sought should be granted. Counsel submitted that the plaintiff has been living on and tilling the 1st and 2nd suit parcels of land for an uninterrupted period of more than 17 years. That the plaintiff’s interest in the said parcels of land also stems from his being a legal beneficiary of deceased 1 and 2. Counsel relied on various authorities including the case of *Mtana Lewa -v- Kabindi Ngala Mwagandi* (2015) eKLR, to fortify the submissions.
17. Learned counsel for the defendant filed submissions dated 25th January 2024 and identified a single issue for determination namely, whether the plaintiff has acquired the suit parcels of land by adverse possession or not. Counsel submitted that land parcel number 1390 was registered in the name of the defendant on 29th July 2008 while land parcel number 1391 was adjudicated to one Jared Owalo Odundo and later registered in the name of the defendant on 4th March 2014. That for the first parcel, time started running on 29th July 2008 upon completion of adjudication. That therefore, the period of 12 years required in adverse possession had not yet lapsed at the time the suit was filed on 15th July 2020.



18. Regarding the 2nd suit parcel of land, counsel submitted that the plaintiff failed to produce a copy of green card to show who was the first registered proprietor and when such registration occurred. That the search certificate relating to that parcel and produced in court, shows that the defendant got registered as proprietor on 4th March 2014, which is approximately six years before the instant suit was filed. That the plaintiff's assertion that he was not aware that the suit parcels of land were registered in the name of the defendant herein means that he did not have an intent to possess the same by way of adverse possession.
19. Moreover, counsel submitted that to succeed in a claim for adverse possession, the plaintiff ought to first concede that the defendant is the true owner of the 1st and 2nd suit parcels of land, rather than alleging fraudulent registration. To reinforce the submissions, reliance was placed on various authorities; *Koeb Kangogo -v- Chebii Yego* (2018) eKLR, *Saraphine Mbae Ritbaa -v- Faustino Kangori M'Nairobi* (2020) eKLR and *Haro Yonda Juaje -v- Sadaka Dzengo Mbauro and Kenya Commercial Bank* (2014) eKLR, to fortify the submissions.
20. I have anxiously considered the parties' respective pleadings, evidence and written submissions. The issues for determination are as set out on the face of the originating summons and as noted 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 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.
21. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -v- Ben Munyitwa Songoi* (2020) eKLR.
22. It is important to note that the plaintiff's claim is for the whole of the 1st and 2nd suit parcels of land measuring 2.0 Ha and 2.03 Ha in area respectively. Therefore, the plaintiffs' claim is over definite portions of land as held in *Muthuita -v- Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
23. In the first instance, the 1st and 2nd suit parcels of land were registered in the defendant's name on 29th July 2008 and 4th March 2014 respectively. This is evidenced by copies of the official search certificates relating to the said parcels of land, PExhibits 1 and 2.
24. Concerning the issue of open and exclusive possession, the plaintiff (PW1) testified that he cultivates the 1st and 2nd parcels of land by planting sugarcane, maize and vegetables thereon from time to time. He produced photographs (PExhibits 3(a) to (e)) in support of his assertions.
25. This piece of evidence was corroborated by, among others, the evidence of DW2 who produced a report (DExhibit 4) and stated that the plaintiff utilizes the suit parcels of land as well as the mother title. During cross-examination, DW2 stated in part:

“...PW1 was using the three parcels on the ground...”
26. 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 Nyachieo -v- Martin Okioma Nyauma & 3 others* (2017) eKLR.



27. As regards the period of possession, PW1 averred that he has been in open, quiet and peaceful use of the 1st and 2nd suit parcels of land since 2003, a period of about 17 years. He produced in evidence photographs of crops grown on the said parcels of land (PExhibits 3(a) to (e)) herein.
28. In examination-in-chief, PW2 admitted that he did not have any evidence to show that PW1 has been cultivating the suit parcels of land since 2003. In cross-examination, he maintained thus:
- “... I have nothing to show that he cultivates the suit parcels of land...”
29. In his replying affidavit, the defendant averred that the plaintiff trespassed onto the 1st and 2nd suit parcels of land in 2014. That therefore, the prescribed statutory period of 12 years for adverse possession has not lapsed hence, the claim for adverse possession is premature and untenable.
30. The defendant’s counsel submitted that for the 1st suit parcel of land, time started running on 29th July 2008 upon completion of adjudication. That for the 2nd suit parcel of land, no copy of green card was produced in evidence to show who was the first registered proprietor. That as such, the only document that the court can rely on is a copy of the official search certificate relating to that parcel which shows that the defendant got registered as proprietor on 4th March 2014, approximately six years before the instant suit was filed.
31. It is trite law that time does not run during consolidation, demarcation and adjudication but starts to run on the date of registration; see *Koech Kangogo case (supra)*, among others.
32. In the present case, the defendant got registered as proprietor of the 1st suit parcel of land on 29th July 2008 while this suit was commenced on 15th July 2020. Clearly, the statutory period of 12 years had not lapsed and the same was brought prematurely. Indeed, the possession of the plaintiff prior to completion of the adjudication process does not amount to adverse possession within the provisions of Section 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
33. Further, I concur with the defendant’s counsel that no sufficient evidence was adduced to indicate when time started running with respect to the 2nd suit parcel of land. According to a copy of the official search certificate relating to that parcel, the defendant got registered as its proprietor on 4th March 2014, approximately six years before the instant suit was lodged.
34. In the foregone, I find that the suit was filed prematurely. Therefore, the plaintiff does not succeed in adverse possession as 12 years had not lapsed at the time of filing the suit from the date the defendant was registered as the proprietor of the 1st and 2nd suit parcels of land.
35. To that end, I hold that the plaintiff has not proved the ingredients of adverse possession to the requisite standard as held in the case of *Wilson Kazungu Katana (supra)*. So, his claim must fail.
36. Accordingly, the instant suit is hereby dismissed.
37. Due to the nature of the relationship between the parties, each party to bear their respective costs of the suit.
38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 28TH FEBRUARY 2024.

G.M.A ONG’ONDO

JUDGE

Present



1. Plaintiff
2. Defendant
3. Mr. Jack Otieno holding brief for Quinter Adoyo, learned counsel for the plaintiff
4. Mr. P. Odhiambo holding brief for G. S. Okoth, learned counsel for the defendant

