



**Onyango v Odhiambo ((Suing as the personal representative of the Estate of Lucas Odhiambo Rang'eng'a - Deceased)) (Environment & Land Case 1 of 2021) [2024] KEELC 827 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 827 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 1 OF 2021  
AY KOROSS, J  
FEBRUARY 22, 2024**

**BETWEEN**

**BONIFACE MUSUMBA ODHIAMBO ONYANGO ..... PLAINTIFF**

**AND**

**CHRISPINE ONYANGO ODHIAMBO (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCAS ODHIAMBO RANG'ENG'A - DECEASED) ..... DEFENDANT**

**(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCAS ODHIAMBO RANG'ENG'A - DECEASED)**

**JUDGMENT**

1. The plaintiff is the registered owner of land parcel no. North Ugenya/Ndenga/744 (suit property) while Lucas Odhiambo Rang'eng'a (Lucas) who was the initial defendant and died on 4/09/2020 was allegedly in occupation of the suit property. Upon his demise, his son Chrispine Onyango Odhiambo (Chrispine) substituted him.
2. By a plaint dated 5/04/2014, the plaintiff contended he purchased the suit property from Alice Elizabeth Omondi (Alice) who was the previous owner.
3. However, in 2000, the defendant entered the suit property without his consent, filed a suit against him before Siaya Land Tribunal Case No. Sya/850/2000 (tribunal case) and when he (defendant) lost the case, he lodged an appeal to the Nyanza Land Disputes Appeals Committee vide Case No. 40 of 2004 (appeal's case) and equally, he lost the appeal. Despite these decisions, Lucas had since refused to vacate the suit property hence the suit.



4. The plaintiff pleaded and particularised trespass and sought a declaratory relief that the plaintiff was not entitled to enter or use the suit property, mandatory and permanent injunctions, general damages and costs and interests.
5. By an amended defence and counterclaim dated 25/06/2021, Chrispine denied the averments made in the plaint and stated Lucas had since 1977 to the date of his demise been in continuous and uninterrupted occupation of the suit property and entitled to it by the doctrine of adverse possession and that the plaintiff's claim was ultimately time barred. In addition, he averred that prior to the suit being filed, no demand notice had ever been issued to him.
6. Further, upon Lucas's demise, he had continued utilising the suit property. Therefore, Chrispine prayed that as Lucas's personal representative and by the doctrine of adverse possession, the suit property should be declared his and be registered in his name and the plaintiff should be ordered to execute transfer documents and in default, the defendant do execute them. He also sought costs of the suit and of the counterclaim.
7. The plaintiff's counsel filed a reply to amended defence and defence to amended counterclaim dated 5/10/2021 in which the plaintiff denied the statements made in the defence and counterclaim and put the defendant to strict proof and urged the court to dismiss the counterclaim with costs.

#### **The plaintiff's case and evidence**

8. The plaintiff testified as PW1. His evidence was composed of his written and oral testimonies and documents he produced in support of his case. His evidence was led by Barrack Ochieng Atolo who testified as PW2.
9. PW1's testimony rehashed some of the averments contained in his claim which were earlier highlighted in this judgement and there is no need for me to rehash them. In addition, it was his case Alice had bought the suit property from Ooko Mugola on 11/07/1975 and further, notwithstanding the tribunal and appeal cases, Lucas had lodged a restriction over the suit property.
10. Further, even after the appeal case, Lucas had wantonly and violently trespassed onto the suit property and in particular, he had chased away officials from Mumias Out- Growers Limited who at the plaintiff's instigation, had sought to survey the suit property.
11. On cross examination, it was his testimony that upon purchase of the suit property in 1996, he cleared it between 1997 and 1998 with the assistance of locals. That upon interference of Mumias Out- Growers Limited by Lucas which took place in 2000, he reported the incident to the chief but he did not have proof of this. Further, he testified Lucas was in occupation of the suit property and had even leased it out. However, he stated he was not privy Lucas had ploughed it since 1997.
12. PW2 testified that Lucas's larger family including himself were aware the plaintiff bought the suit property from Alice and the plaintiff was a bonafide purchaser and Chrispine was in illegal occupation. In addition, he testified Lucas was a nephew of Ooko and Alice who had since died.
13. On cross examination, PW2 stated Lucas was his relative and all parties including himself were neighbours and transactions between Ooko and Alice took place before he was born. He further testified he had ongoing court cases with the defendant concerning land and that the plaintiff was chased away from the suit property in 2016.

Defendant's case and evidence



14. Chrispine testified as DW1 and his evidence was composed of his written and oral testimonies. Similar to the plaintiff, some of his statements were contained in his defence and counterclaim and I will not belabour in repeating them.
15. In addition, he averred that even if it was undisputed the plaintiff was the suit property's registered owner and he was not challenging the mode of its acquisition, the plaintiff never took possession of it and neither did Alice and his family had always tilled the suit property.
16. Further, he stated PW2 and his family had existing disputes in court and the bodies that determined the tribunal and appeal's cases were bereft of jurisdiction and no demand notices were ever issued to him. On cross examination, he stated that during the transactions between Alice and Ooko, he had not been born.
17. In leading the evidence of DW1, Charles Otieno Oloo who was a relative of PW1 and DW1 testified as DW2 and relied on his written and oral testimonies. It was his case he was familiar with the suit property and to his knowledge, Lucas tilled it from 1977 and in converse, the plaintiff had never occupied it.
18. On cross examination, he asserted during his childhood between 1970 and 1983, he lived on the suit property and to his knowledge, both Ooko and Mugola Ragenga who were brothers and with the latter being Lucas's father, jointly used the suit property. He averred that as far as he was concerned, the suit property belonged to Lucas who inherited it from Ooko. He further asserted that similar to the plaintiff, Alice never occupied the suit property and upon Lucas' demise, Chrispine tilled the suit property.

#### **Parties' submissions**

19. As directed by the court, the plaintiff's counsel on record M/s. Mugoye & Associates filed his written submissions dated 18/09/2023 whilst the defendant's counsel Ms. Owino & Co. Advocates failed to do so and if at all they will be filed, this court will not consider them.
20. The Plaintiff's counsel identifies the following issues as arising for determination (a) whether the plaintiff is the bonafide owner of the suit property (b) whether the disputes were determined by the tribunal case (c) whether the defendant proved adverse possession (d) whether the defendant is liable for trespass and, (e) whether the court should issue permanent injunctive orders.
21. On the 1<sup>st</sup> issue, counsel submits the plaintiff holds an indefeasible title to the suit property and by virtue of Section 24 of the *Land Registration Act*, he should enjoy the rights thereto. To affirm his argument, counsel relies on the case of Lawrence Musango Oketch & 2 others v Karen Enterprises Limited [2017] eKLR. However, it is noted this decision was overturned by the Court of Appeal in Lawrence Musango Oketch & 2 others v Karen Enterprises Limited [2019] eKLR.
22. On the 2<sup>nd</sup> issue, counsel submits the matters were heard and determined by the outcomes of the tribunal and appeal cases and argues the counterclaim is res judicata. To buttress his position, counsel relies on the case of Republic v Land Dispute Tribunal, Bahati & another; Peter Karani Nduku (Interested Party) Ex parte Jacob Kipkurui Konga & another [2020] eKLR where the court in this persuasive decision stated thus: -

“It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009... If he was not satisfied with the decision of the



Appeals Committee, he ought to have filed an appeal against the committee's decision if a point of Law was involved in the High Court."

23. On the 3<sup>rd</sup> issue, counsel challenges the manner in which the claim of adverse possession was filed as a counterclaim as opposed to moving the court by an originating summons as envisaged by Order 37 Rule 1 of the Civil Procedure Rules. Unfortunately, the decision counsel relies upon to buttress his position has not been tendered to this court. In addition, counsel argues that the period of 12 years that the defendant was in occupation was interfered with by the tribunal and appeal cases.
24. On the 4<sup>th</sup> issue, counsel contends that the plaintiff proved his claim of trespass as defined by Section 3(1) of the *Trespass Act* and relies on the case of John Kiragu Kimani v Rural Electrification Authority [2018] eKLR. Counsel implores this court to assess damages as guided by the Court of Appeal decision of Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR. On the last issue, counsel beseechs this court to grant the plaintiff who has never had access to the suit property, a right to enjoy it.

### **Undisputed facts**

25. After hearing both parties' evidence and considering their pleadings, it is undisputed the defendant is in possession of the suit property. However, it is disputed whether he entered it in 1977 or 2000. It is also undisputed the suit property is registered in the plaintiff's name and further, it is undisputed the plaintiff and Lucas had been entangled in the tribunal and appeal cases and Lucas was unsuccessful.

### **Issues for determination, Analysis and Determination**

26. I have considered the pleadings, evidence adduced by the parties, as well as the plaintiff counsels' submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and the defendant's counterclaim and conceivably the issues for determination are;
- I. Whether the counterclaim is res judicata.
  - II. Whether the counterclaim is competently before this court and whether the defendant proved his counterclaim of adverse possession.
  - III. Whether the plaintiff proved his claim of trespass.
  - IV. What orders should this court issue.

#### **I. Whether the counterclaim is res judicata.**

27. The definition of res judicata is found in Section 7 of the *Civil Procedure Act*. The key ingredients are that the matters must have been directly and substantially been in issue in a former suit, between the same parties, under the same title and determined on merits by a competent court.
28. Although the plaintiff's counsel alludes the tribunal and appeal cases resolved the defendant's counterclaim with finality, I respectfully disagree with counsel. Without belaboring into merits of the tribunal and appeal cases, it emerges the defendant's claim before these bodies were challenging the plaintiff's registration over the suit property and not a claim of adverse possession.
28. Further, in any case, by virtue of Section 38 (1) of the Limitation of Actions, at the time, the High Court had exclusive jurisdiction over adverse possession claims and it was not tenable for these bodies to adjudicate such a claim. Thus, it follows counsel's arguments are misplaced. I find and hold that the defendant's counterclaim is not res judicata.



## **II. Whether the counterclaim is competently before this court and whether the defendant proved his counterclaim of adverse possession.**

28. On the 1<sup>st</sup> limb of this issue, this court is in agreement with the plaintiff's counsel that by virtue of Order 37 Rule 7 of the Civil Procedure Rules, a claim of adverse possession ordinarily commences by an originating summons. Nevertheless, the circumstances in this case are different.
28. In my view, it would have been absurd for the defendant to file a separate suit on his claim yet a subsisting suit existed against him. Such a scenario arose in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR and after considering the issue, the Court of Appeal's decision which I hereby adopt settled it thus: -
- “The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See *Mariba v Mariba* Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See *Wabala v Okumu* (1997) LLR 609 (CAK).”
- See also the Court of Appeal decision of *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No 26 of 2015.
28. Accordingly, and being bound by these decisions, I need not say more. I find and hold the counterclaim is competently before me. Therefore, I will now address the 2<sup>nd</sup> limb of this issue.
28. The common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof and from these provisions of law and settled case law, the onus is on the defendant who claims adverse possession to prove that he is an intruder, he has been in unlawful occupation for a period of over 12 years to the time of filing suit, the claim is against the registered owner, show clear and unequivocal evidence he has dispossessed the owner or the owner has discontinued possession in a manner that is without permission and his occupation is, with the knowledge of the true owner, without secrecy, without evasion and in continuous occupation of a determinable portion of the suit property. See *Mtana Lewa v Kahindi Ngala* (2015) eKLR and *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] eKLR.
28. The defendant has to meet not one but all the elements of adverse possession. The question that arises is whether time started to accrue from 1977 or 2000 and for me to answer this, I have to interrogate the evidence on record.
28. The plaintiff's testimony is unshaken that the Lucas forcefully entered the suit property in 2000 without his permission. This evidence is consistent with his testimony in the tribunal case. On the other hand, even if DW1 and DW2 were adamant that Lucas had always tilled the suit property from 1977 without interruption, they did not explain the period of his absence from the suit property or neighbourhood during the interlude of his residence in Nairobi as evidenced by his testimony before the tribunal and on that basis, I find Lucas possessed the suit property from the year 2000 which is a period of over 12 years to the time the suit was filed.
28. Even so, this period was interfered with when the plaintiff filed a claim before the tribunal on 29/05/2001 which was concluded by the appeal case on 7/10/2010. Thus, time for purposes of adverse possession could only commence 12 years from 7/10/2010. In other words, time stopped running when the defendant filed suit before the tribunal and could only start running afresh upon conclusion of the appeal's case.



28. This case having been filed just close to 4 years after the outcome of the of appeal's case, it means notwithstanding the plaintiff's possession of the suit property, his claim of adverse possession is not ripe. See the Court of Appeal decision of Lazaro Kabebe v Ndege Makau & another [2017] eKLR. Consequently, I find and hold Lucas did not prove his claim of adverse possession.

### III. Whether the plaintiff proved his claim of trespass.

28. Article 40 of *the Constitution* recognises every person has the right to acquire and own property of any description and in any part of Kenya. Protections and limitations to such rights over land are protected by the Sections 24, 25 and 26 of the *Land Registration Act* which sets out land's rights, privileges, appurtenances, liabilities and interests.
28. Section 3 (1) of the *Trespass Act* defines trespass as: -
- “any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”
28. The case of John K Koech v Peter Chepkwony [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defined trespass as follows:
- “Any unjustifiable intrusion by one person upon land in possession of another”...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”
28. Since the plaintiff's registration as the proprietor of the suit property is unquestionable, he has a right to quietly enjoy it. The plaintiff's averments that Lucas occupies the suit property without his permission is unchallenged and I therefore find and hold that he proved his claim of trespass.

### IV. What orders should this court issue.

28. It is trite law that trespass is actionable per se and having proved trespass, the plaintiff is entitled to general damages. In Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR, Odero J stated that: -
- “in tort, damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful action on the part of the defendant... In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The cost of restoration of the land to the position it was in before the wrongful act was committed are factored in.”
28. While in Park Towers Limited vs. John Mithamo Njika & 7 others [2014] eKLR, the court stated: -
- “...where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under the duty to assess the damages awardable depending on the unique facts and circumstances of each case.’
28. In his evidence, the plaintiff merely asserts that he is incurring losses of kshs. 5,000/- as letting value of the suit property and he did not disclose whether this figure accrued monthly or yearly. In addition, the plaintiff did not lead any evidence on the amount of diminution in value of the suit property or the costs of its reinstatement and for these reasons, I hereby assess general damages at kshs. 300,000/-. Since it is trite law costs follow the event, I award costs of the suit and of the counterclaim to the plaintiff.



28. Finally, and for the reasons stated hereinabove, it is my ultimate finding that the plaintiff proved his case against the defendant while the defendant did not prove his counterclaim against the plaintiff to the required standards. The defendant's counterclaim is dismissed. Therefore, I hereby issue the following disposal orders;
- a. A declaration is hereby made that the defendant and his heirs are not entitled to enter and use North Ugenya/Ndenga/744.
  - b. The defendant and his heirs are hereby granted 90 days from the date of service of the orders of this court to remove themselves and their developments from land parcel no. North Ugenya/Ndenga/744 and give the plaintiff vacant possession and in default, the plaintiff shall forcefully evict the defendant and his heirs together with their servants or agents.
  - c. A permanent injunction is hereby issued against the defendant and his heirs restraining them their servants and /or agents from entering, using, selling, alienating, interfering, occupying or in any way dealing whatsoever with land parcel no. North Ugenya/Ndenga/744.
  - d. General damages for trespass are ordered in the sum of kshs. 300,000/- payable by the defendant to the plaintiff.
  - e. The defendant's counterclaim is hereby dismissed.
  - f. The costs of the suit and counterclaim are awarded to the plaintiff.
- Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**22/02/2024**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Mr. Mugoye for the plaintiff

N/A for the defendant

Court assistant: Mr. Ishmael Orwa.

