



**Owuor v Awuor (Environment and Land Appeal E016 of 2023)
[2024] KEELC 787 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E016 OF 2023
GMA ONGONDO, J
FEBRUARY 21, 2024**

BETWEEN

JONES OGADA OWUOR APPELLANT

AND

NICHOLAS OYOKO AWUOR RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. Onzere E.M, Principal Magistrate delivered at Ndhiwa on the 7th day of March, 2023 in Ndhiwa PMC ELC No. 34 of 2021))

JUDGMENT

1. The central property in this appeal is land parcel number Kanyamwa/Kabonyo/Kwandiku/577 (the suit land) located within Ndhiwa sub County in Homa Bay County.
2. The appeal emanates from the judgment delivered on 7th March 2023 where the learned trial magistrate (Hon. E.M Onzere, PM) held that the respondent who was the plaintiff before the trial court had proved his case against the defendant who is the appellant herein, to the required standard. Therefore, she ordered thus;
 - a. That the respondent/plaintiff is entitled to two (2) acres of the suit land by virtue of adverse possession.
 - b. The appellant/defendant to sign the necessary documents to affect the transfer of 2 acres of the suit land to the plaintiff within the next thirty (30) days from the date of judgement failure to which the Court Administrator Ndhiwa Law Courts to sign the transfer forms to enable implementation of the order.
 - c. The appellant/defendant be restrained from evicting, dispossessing or any other manner interfering with the ownership rights of the plaintiff over the two acres of the suit land.
 - d. The costs of the suit be awarded to the plaintiff.



3. The appellant was aggrieved thereby. So, through Quinter Adoyo and Company Advocates, he preferred the appeal by way of a memorandum of appeal dated 29th March 2023 founded upon the following grounds;
 - a. That the Honourable Court erred in law and in fact in holding and finding that there was a valid land sale agreement despite the inconsistencies portrayed by the plaintiff/respondent and his witnesses clearly showing that the agreement was forged.
 - b. That the Honourable Court erred in law and fact by ignoring the weight of contradictory evidence adduced in favour of the agreement and more especially, the open denial of the agreement by chief Lore Damba, who was alleged to have written it.
 - c. The Honourable court erred in law and fact in failing to address and consider the mandatory provisions of Section 8 of the Land Control Act despite counsel for the Appellant having submitted on the same.
 - d. The Honourable court erred in law and fact in ignoring the undisputed fact that the Respondent herein entered and remained in the land with the consent of the Appellant/proprietor from 1997 until 2021 when the consent ceased and he was asked to vacate or purchase, and that occupation by consent of the owner, no matter how long, does not constitute adverse possession.
 - e. The Honourable Court erred in law and fact in failing to soundly and legally appreciate the fact that since the Respondent entered and remained on the land with the consent of the owner in 1997 until 2021 when the consent ceased, adverse possession commenced in 2021 and not 1997.
 - f. The Honourable court erred in law and fact by failing to appreciate the fact that if real adverse possession commenced in 2021 when occupation by consent ceased, then the Respondent had been in adverse possession for only a few months or one year at the time he instituted the suit at Ndhiwa.
 - g. That the Honourable Court erred in law and fact by unjustly awarding the Respondent the Appellant's land despite the weight of evidence.
4. Wherefore, the appellant has sought the orders infra;
 - a. That after analysis of the facts and the Applicable law afresh, this court be pleased to set aside the judgment and decree of the trial court.
 - b. Costs of the Appeal be awarded to the Appellant.
5. On 7th November 2023, the court directed that the appeal be heard by way of written submissions.
6. Accordingly, the appellant's counsel filed submissions dated 2nd February 2024 and made reference to the suit land, the judgment of the trial court, the grounds of appeal and parties' respective cases. Counsel delineated the issues for determination including whether the appellant entered into sale agreement dated 7th January 1997 (PExhibit 1 herein). Counsel submitted in part that the testimonies of the respondent (PW1), Omenda Owuor (PW2), Alice Nasimiyu (PW3) and George Omollo Ndonga (PW4) took varying positions on PExhibit 1 hence inconsistent thereof.
7. In the result, counsel termed the appeal meritorious and implored the court to allow it with costs. To buttress the submissions, counsel relied upon sections 107 to 109 of the Evidence Act Chapter 80 Laws



of Kenya, section 8 of the [Land Control Act](#) Chapter 302 of the Laws of Kenya and [Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi and another](#) (2014) eKLR, among others.

8. The respondent through Moriasi Osoro and Company Advocates filed submissions dated 8th February 2024 stating brief facts of the suit before the trial court and the grounds of appeal. Counsel submitted that the respondent paid full purchase price for the suit land in 1997 and has continuously stayed thereon for 27 years. That PExhibit 1 is valid as the parties who entered into it and witnesses, were present and signed the same.
9. Counsel submitted that the impugned judgment is without any error and urged this court to uphold it. That the appeal be dismissed with costs. To fortify the submissions, counsel relied upon the case of [Mwangangi \(Suing as the Legal Representative of the estate of Witham Mwangangi Kirima-Deceased\) v M'Mtua](#) ELC No. E006 OF 2020 (2023) KEELC 18499 (KLR).
10. As this is a first appellate court, it is my duty to subject the entire evidence on record to a fresh and exhaustive re-evaluation and re-appraisal targeted at reaching my own inferences in the instant dispute. That in doing so, I bear in mind that the trial court had the added advantage of having seen and heard the witnesses as they testified while I am limited thereto but entitled to depart from the trial court's findings if they are based on no evidence or there has been a misapprehension of the evidence; see [Sellev Associated Motor Boat Company Ltd](#) (1968) EA 123 and [PIL Kenya Ltd v Oppong](#) (2009) KLR 442.
11. Notably, on 25th November 2021, the respondent filed the original suit by way of an originating summons dated 23rd November 2021 under Order 37 Rules 7 and 14 of the [Civil Procedure Rules](#), 2010 seeking the determination of the issues infra;
 - a. Whether the plaintiff settled on the suit land in the year 1977 before adjudication and registration.
 - b. Whether the said was bought by Nicholas Oyoko Awuor the plaintiff and the plaintiff to settle on the suit land.
 - c. Whether the defendant was present when the plaintiff was settling on the said land after the purchase of the suit land
 - d. Whether the defendant should be compelled to transfer the portion of land bought by the plaintiff failure which the court executive officer do sign the necessary documents to enable the Land Registrar HomaBay County effect the transfer.
 - e. Whether the plaintiff has quietly and peacefully occupied the suit land for a period of approximately 24 years unchallenged.
 - f. Whether an injunction should issue against the defendants, their agents, servants or anybody deriving authority from him, restraining them from evicting, dispossessing or in any way interfering with the plaintiff peaceful occupation, use and quiet enjoyment of the suit land.
 - g. Whether the said occupation and possession of the suit land can now amount to Adverse Possession and if so what is the effect thereof.
 - h. Whether the defendants should pay the costs of the suit.
 - i. That such orders may be issued as the Honourable Court may attain the ends of justice.
12. The appellant opposed the originating summons by his replying affidavit of twenty-five (25) paragraphs sworn on 5th January 2022. He deposed, inter alia, that he is the absolute registered owner



- of the entire suit land as revealed in a certificate of official search marked “JOO-01” annexed to the affidavit (DExhibit 1). That in the year 1997, the respondent approached him with his father, Awuor Oyoko, a close friend of the appellant and requested for a portion of the suit land for farming and settlement. That the appellant heeded to the request and allowed them to cultivate part of the suit land.
13. Further, the appellant averred that the respondent refused to vacate the suit land when he asked him to vacate it. That the respondent has not exhibited any duly executed agreement for sale of the alleged two acres of the suit land in 1997. That the respondent’s claim is improper, lacks merit and should be dismissed with costs.
 14. I have carefully considered the grounds of appeal, the rival submissions including the cases cited therein and the pleadings in the original suit. The issues for determination herein appear in the parties’ respective pleadings alongside the grounds of appeal which boil down to whether;
 - a. PExhibit 1 is valid,
 - b. The respondent’s claim for adverse possession over the suit land, is tenable,
 - c. The orders sought in the memorandum of appeal are merited.
 15. It is borne in mind that PExhibit 1 is a contract for the disposition of an interest in land and it is in writing, signed by the parties to it and attested by witness (s) who were present when it was signed by the parties as provided for under section 3 (3) of the Law of Contract Act. This court is conscious of the meaning of the terms; “disposition”, “interest in land” and “sign” under section 3 (6) of the said Act.
 16. Section 97 (1) of the Evidence Act Chapter 80 Laws of Kenya provides;

“No evidence to prove or in proof of terms of contract in a document except the document itself or secondary evidence of it’s contents in cases where secondary evidence is admissible.”
 17. The respondent (PW1) relied upon his statement and PExhibit 1 as part of his evidence in chief and stated that he signed PEXhibit 1 together with the appellant (DW1) as well as Omenda Owuor (PW2) Alice Nasimiyu Oyoko (PW 3) George Omolo Ndonga (PW4) and other witnesses. That he paid kshs. 24,000/= for the suit land and settled on it in 1997
 18. During cross examination, PW1 maintained that he bought the suit land from the appellant at the purchase price of Kshs. 24,000/= as revealed in PExhibit 1. That he requested the appellant (DW1) to transfer it to him and the latter asked him to be patient but failed to execute the transfer.
 19. PW2 relied on his statement filed on 11th January 2022 as part of his evidence in chief. He testified inter alia, that PW1 and DW1 entered into PExhibit 1 and PW1 paid the purchase price for the suit land. His testimony was affirmed by, PW3, the wife of PW1 who relied on her statement filed in court and maintained that she was present when PW1 and DW1 entered into PExhibit 1 which she signed and that consideration was paid once to DW1. It was also corroborated by PW4 who relied on his statement dated 11th January 2022 as part of his evidence and stated that he signed PExhibit 1.
 20. PW1 testified that he cultivated maize and beans on the suit land up to 2021. This piece of evidence was confirmed by PW3 who stated that they have been in cultivation of the same from 1997.
 21. Further, their testimonies of PW1 and PW3 were corroborated by PW6, Benard Otieno Ayieko, a former chief Central Kanyamwa Location in Ndhiwa, who relied on his statement filed in court. PW6 stated that the appellant, the respondent and himself come from the same locality. That the respondent bought 2 acres of the suit land from the appellant in 1997 and built a house thereon.



22. The appellant (DW1) referred to his replying affidavit alongside a copy of certificate of official search (DExhibit 1) and Identity card (DExhibit 2) as part of his testimony. He told the court, *inter alia*, that he did not enter into PExhibit 1. That his ID No. XXXXXXXX was issued to him on 11th January 1997 and there is no way it could have been put in PExhibit 1 dated 7th January 1997. He requested the court to give him back the suit land.
23. Under cross examination, DW1 told the court that his original ID got burnt in the house in 1965 and he had it replaced. That the suit land was registered in his name in 1992. That in 1990, he gave the suit land for free to PW1 who did not build thereon.
24. DW2, Priscila Bunde, a sister in law to DW1, premised part of her evidence on her affidavit and stated that the respondent and his father requested the appellant for a portion of land to grow groundnuts. That she was present during the discussion at the house of the appellant who gave them the portion and the respondent planted maize on it. To that extent, DW2 fortified the evidence of PW1, PW3 and PW6.
25. In reaching the impugned judgment, the learned trial magistrate objectively noted that;

“There is proof that the defendant held ID number XXXXXXXX as at 7th January 1997 when the land sale agreement was entered into. I find that the land sale agreement dated 7th January 1997 exists and it is valid and there is proof that the plaintiff bought 2 acres of the land from the defendant.”
26. Furthermore, the court noted that there is proof that the respondent entered the suit land pursuant to a valid sale agreement. That the respondent’s possession of it is deemed to have become adverse to that of the owner after payment of the full purchase price and that thereafter, the respondent had occupied the suit land for more than twenty years. She relied on *WambuguvNjuguna* (1983) KLR 173 and *Simon Ng’ang’a NjorogevDaniel Kinyua Mwangi* (2015) KLR.
27. The trial court’s findings are in consonant with the evidence on record, the facts and the law. PExhibit 1 is valid. The suit land is registered in the name of appellant as discerned in paragraph 4 of his Replying Affidavit and paragraph 3 of the affidavit in support of the originating summons. All adverse possession elements were proved against the appellant on a balance of probability at the trial court as held in John *Kanyungu NjoguvDaniel Kimani Maingi* (2000) eKLR and *Ahmed AbdulkarimvMember for Lands and Mines* (1958) EA 43 at 441.
28. In conclusion, it is the considered view of this court that the trial court’s judgment is solid at law and I affirm the same accordingly. The appellant is not entitled to the orders sought in this appeal.
29. A fortiori, this appeal commenced by a memorandum of appeal dated 29th March 2023 is devoid of merit. The same is hereby dismissed with costs to the respondent
30. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 21ST FEBRUARY 2024.

GEORGE M. A ONG’ONDO

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JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

Present;

- a. Mr. Ongoro instructed by Q.Adoyo learned counsel for the appellant
- b. Mr R. Ochieng instructed by Moriasi Ogoro learned counsel for the respondent
- c. Mutiva, court assistant

