



REPUBLIC OF KENYA



**Oluoch v Tindi (Environment & Land Case 3 of 2022)
[2024] KEELC 772 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 3 OF 2022
GMA ONGONDO, J
FEBRUARY 20, 2024**

BETWEEN

NASHON OCHIENG OLUOCH PLAINTIFF

AND

CHARLES ONYANGO TINDI DEFENDANT

JUDGMENT

1. On 24th February 2022, the plaintiff, Nashon Ochieng Oluoch through L.K. Obwanda Advocates commenced the instant suit by way of an Originating Summons dated 23rd February 2022, pursuant to Order 37 Rule 7 of the Civil Procedure Rules, 2010 and Section 38 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. He is seeking determination of the issues which include:
 - a. Whether the plaintiff herein is entitled under Section 38 of [Limitation of Actions Act](#) to be registered as the absolute proprietor of a portion of land comprised in one of the subdivisions of L. R. No. Kanyada/Kotieno/Katuma 'A'/1481 (the suit land herein).
 - b. Whether the subsequent subdivisions of the suit land were derived from L.R. No. Kanyada/Kotieno/Katuma 'A'/909 (the original title) owned by the defendant.
 - c. Whether the defendant is the registered owner in trust of a portion of the suit land for the plaintiff.
 - d. Whether the defendant should transfer the said portion of parcel of land to the plaintiff.
 - e. Whether in default of the defendant to transfer the said land, the Deputy Registrar of the court should execute all such documents as may be necessary for the registration of the plaintiff as proprietor of one of the resultant number of the above portion of land number Kanyada/Kotieno/Katuma 'A'/2789.
 - f. Whether the defendant should pay the costs of this originating summons.



2. The originating summons is anchored on grounds (i) to (iv) on the face thereof and a nineteen (19) paragraphed supporting affidavit of the plaintiff sworn on even date and filed on 24th February 2022 as well as documents annexed thereto to wit; copies of sale agreements, copies of the mutation forms, photographs and a copy of green card. The plaintiff deposed, inter alia, that on 19th June 2001 and 4th September 2003, he entered into a sale of land agreement with the defendant for a portion of the original title measuring 1.16 Ha in area. That, the defendant caused the original title to be subdivided resulting into two parcels, and later further subdivided into several parcels which have been transferred to various purchasers.
3. Also, the plaintiff averred that he has been in open occupation of land reference number Kanyada/Kotieno 'A'/2789 measuring approximately 1.6 Ha, being a portion of the suit land, for over 20 years. That the defendant intends to sell the said portion. That he has constructed a house and cultivates maize and beans thereon.
4. PW1, Nashon Ochieng Oluoch, relied on the originating summons and supporting affidavit filed herein, which was adopted as part of his evidence. He also relied on copies of sale agreements dated 19th June 2001 and 4th September 2003 (PExhibits 1(a) and (b)), copies of the mutation forms dated 9th May 2018 and 12th March 2019 (PExhibits 2(a) and (b)), copies of photographs ((PExhibits 3(a), (b), (c) and (d)) and a copy of green card registers for the suit land and parcel number 2789 (PExhibits 4 and 5) and survey report dated 20th September 2023 (PExhibit 6).
5. In cross-examination, PW1 stated that he purchased the disputed portion at a consideration of Kshs.90,000 and not Kshs.150,000 from the defendant. That the same was shown in PExhibits 1(a) and (b).
6. On 6th March 2022, the defendant, through learned counsel, M/s Nyauke and Company Advocates, filed a replying affidavit whereby he opposed the claim. He deposed, inter alia, that the parties entered into an oral contract for sale of land after which the plaintiff entered onto the suit land with his consent. That therefore, the claim for adverse possession is untenable and the instant suit lacks merit thus, ought to be dismissed.
7. DW1, Charles Onyango Tindi, testified that he sold a portion of the suit land to the plaintiff who only paid Kshs.60,000/- out of the agreed Kshs.90,000/- purchase price. That the sale occurred in 2001 and the portion so sold measured 0.32 Ha in area. That the plaintiff entered onto the suit land and built thereon with his consent.
8. In cross-examination, he denied executing PExhibits 1(b) as well as PExhibits 2(a) and (b). He admitted that he never took the defendant to appear before the Land Control Board for consent as regards the sale. That the plaintiff has been utilizing a portion of the suit land measuring 1.1 Ha in area since 2019.
9. DW2 was Kenneth Achieng, Chief - West Kanyada Location, who testified that following the sale of a portion of the suit land by the defendant to the plaintiff, a dispute arose between them. That he advised parties to engage a surveyor with a view to resolving the dispute amicably.
10. During cross-examination, he stated that it is DW1 who lodged a complaint against the plaintiff. That the same was a boundary dispute.
11. The plaintiff's counsel filed submissions dated 26th January 2024 on 30th January 2023 and identified the following issues for determination:
 - a. Whether the parties entered into a sale agreement.



- b. Whether the occupation and possession by the plaintiff over a portion of the suit land measuring approximately 1.6 Ha in area constituted adverse possession.
 - c. Whether the plaintiff at the time of institution of the suit had acquired title to a portion of the suit land measuring approximately 1.6 Ha in area by way of adverse possession and hence entitled to be registered as owner in place of the defendant.
 - d. Who bears the costs of the suit?
12. Briefly, counsel submitted that the parties herein entered into a valid sale agreement, although the same has been rendered void due to failure of the parties to obtain consent of the Land Control Board to transfer the portion of the suit land sold within the prescribed period of six months. That the plaintiff has been in open and uninterrupted possession of the disputed portion of the suit land for a period in excess of twelve years. That therefore, he has acquired the same by way of adverse possession. Counsel relied on various authorities including the case of *Wambugu v Njuguna* [1983] KLR 173, to fortify the submissions.
 13. Learned counsel for the respondent filed submissions dated 2nd March 2022 and 16th November 2023 and submitted that the acreage of the portion of the suit land purchased by the plaintiff is disputed. That there is no proof availed by the plaintiff that he completed payment of the purchase price thereof. That further, adverse possession only accrues when the person claiming such possession moved to the land in question as a trespasser. Reliance was placed on various authorities to buttress the submissions, including the case of *Kasuve v Mwani Investments Limited and 4 others* [2004] 1KLR 184.
 14. Counsel also highlighted their respective submissions on 31st January 2024. Briefly, counsel for the plaintiff relied on PExhibits 1(a) and (b) in support of the plaintiff's claim while counsel for the defendant submitted that the plaintiff's documents do not support the said claim.
 15. I have anxiously considered the parties' respective pleadings, evidence, written submissions as well as oral submissions. The issues for determination are as discerned on the face of the originating summons and as captured in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshein and another* [2015] eKLR, where the Court of Appeal stated 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.
 16. 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.
 17. It must be observed that the plaintiff's claim is for a portion of the suit land measuring approximately one decimal six hectares (1.6 Ha) in area. The first agreement dated 19th June 2001 is for sale of a portion of the suit land measuring 0.6 Ha in area while the second sale agreement dated 4th September 2003 is for 0.56 Ha thereof. Therefore, the plaintiffs' claim is over a definite portion of land as held in *Muthuita v Wanoe & 2 others* [2008] 1KLR (G&F) 1024.
 18. In the first instance, the suit land is registered in the defendant's name. The same was subdivided into parcel numbers 2789 and 2790. The former was later subdivided into parcel numbers 3016, 3017,



3062 and 3063. This is evidenced by a copy of the green card relating to the suit land and subsequent resultant parcel numbers 2789 (PEXhibits 4 and 5).

19. This court subscribes to the decision of the Court of Appeal in Wambugu case (supra) wherein it was stated that:

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

20. Indeed, the plaintiff herein being a purchaser whose possession is based on a contract of sale can only justify a claim for adverse possession if the contract of sale had been repudiated or rescinded. Alternatively, there is such justification upon the purchaser’s payment of the last installment of the purchase price.
21. According to PEXhibits 1(a) and (b), the defendant affixed his signature as proof of payment of the purchase price. The last installment of the purchase price was paid by the plaintiff on 4th September 2003, after which his possession of the portion of the suit land became adverse to the defendant. Clearly, that is a period in excess of twelve years as noted in Wilson Katana, Kasuve and Wambugu cases (supra).
22. Notably, the plaintiff has established his home on the disputed portion of the suit land as evidenced by copies of photographs ((PEXhibits 3(a), (b), (c) and (d). His possession and occupation of the same is notorious and ousted the defendant therefrom as held in Gatimu Kiriguru v Muya Gakangi [1976] KLR 253. Therefore, he has proved his claim for adverse possession in the circumstances.
23. From the evidence on record, the plaintiff purchased a portion of the suit land from the defendant and paid the purchase price. Both parties confirmed that they failed to obtain the consent of the land control board at the instance of the defendant. 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 and Section 28(b) of the *Land Registration Act*, 2016[2012].
24. In that regard, this court subscribes to the Court of Appeal decision in Aliaza -vs- Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) wherein it was noted that a distinction must be made between two situations:
- a. Where the Land Control Board in a particular area refuses to give consent for good public policy reasons; and
 - b. Where a seller fails or refuses to apply for such consent.
25. The said Court succinctly stated that:

“...There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been ‘refused’ within



the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act. (Emphasis laid)

26. In *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held that under Article 10 (2) (b) of *the Constitution* of Kenya, 2010, equity as a principle of justice has been elevated to a constitutional principle. That in exercising judicial authority, the courts are required to protect and promote the said principle, among others, in the spirit of Article 159 (2) (e) of the said Constitution. Further, the court held:

“...the lack of consent of the Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust...”

27. Sections 107 to 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya stipulate that the legal burden of proof in a case is always static and rests on the claimant throughout the trial. I note that according to PExhibits 1(a) and (b), the defendant affixed his signature as proof of payment of the purchase price. Although he denied executing PExhibit 1(b) as well as PExhibits 2(a) and (b), he failed to adduce evidence to establish that the same was a forgery.

28. With respect to the evidential burden of proof, the Supreme Court of Kenya pronounced itself as follows in the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR:

“...Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced...”

29. It is therefore, this court’s considered view that the evidential burden of proof shifted to the defendant to show that indeed, he did not execute the second sale agreement dated 4th September 2003 as well as the mutation forms (PExhibits 1(b) and 2(a) and (b) respectively). However, no evidence in support of the same was adduced herein. Therefore, the defendant’s assertion that the plaintiff did not complete payment of the purchase price is unsubstantiated; see also *Linus Ng’ang’a Kionge and 3 others v Town Council of Kikuyu* [2012] eKLR.

30. In the premises, it is the finding of this court that the plaintiff has acquired a portion of the suit land measuring approximately 1.6 Ha in area by virtue of adverse possession as well as equitable estoppel and constructive trust. He has proved his claim to the requisite standard. Thus, he is entitled to the orders sought in this suit.

31. A fortiori, I enter judgment for the plaintiff against the defendant in the following terms:

- a. The plaintiff herein is entitled under Section 38 of *Limitation of Actions Act* to be registered as the absolute proprietor of a portion of land measuring approximately 1.6 Ha in area comprised in one of the subdivisions of L. R. No. Kanyada/Kotieno/Katuma ‘A’/1481 (the suit land herein).
- b. The subsequent subdivisions of the suit land were derived from L.R. No. Kanyada/Kotieno/Katuma ‘A’/909 (the original title) owned by the defendant.
- c. The defendant is the registered owner in trust of a portion of the suit land for the plaintiff.
- d. The defendant to transfer the said portion of parcel of land to the plaintiff.



e. In default of the defendant to transfer the said land, the Deputy Registrar of the court should execute all such documents as may be necessary for the registration of the plaintiff as proprietor of one of the resultant number of the above portion measuring 1.6 Ha in area of land number Kanyada/Kotieno/Katuma 'A'/2789.

f. The defendant should pay the costs of this originating summons.

32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 20TH FEBRUARY 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Madoro holding brief for L. K. Obwanda, learned counsel for the plaintiff.

2. Mr. S. Nyauke, learned counsel for the defendant.

3. Defendant.

4. Luanga, Court Assistant

