



**Omare v Saleh & 3 others (Environment & Land Case 814 of 2017)
[2024] KEELC 1502 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 814 OF 2017
MN GICHERU & JE GICHERU, JJ
MARCH 19, 2024**

BETWEEN

MUSA ONSANDO OMARE APPLICANT

AND

YUSUF GITHINJI SALEH 1ST RESPONDENT

HUSSEIN GITHINJI MWANGI 2ND RESPONDENT

JOSEPH KAMAU MWANGI 3RD RESPONDENT

**FRANCIS RUHIU MACHARIA T/A CORO BAR – AND
RESTAURANT 4TH RESPONDENT**

JUDGMENT

1. The plaintiff seeks the following orders against the defendants.
 - a. A declaration that the defendants right to recover L.R. 13977 Kajiado/Ngong is barred by Section 7 of the Limitation of Actions Act on the grounds that since December 1980, the plaintiff has been openly, peacefully and as of right in occupation of the mentioned suit land, that is to say for a period of over twelve (12) years, preceding the presentation of this summons in court.
 - b. That there be an order that the applicant herein be registered as the proprietor of L.R. 13977 Kajiado/Ngong in place of the respondents under Section 38 of the Limitation of Actions Act.
 - c. That costs hereof be paid by the respondents. This is as per the originating summons dated 30/6/2016
2. The plaintiff’s case is as follows. In 1980, he purchased L.R.305/167 Ngong measuring 0.25 acres from Manhohan Singh Chawla. The purchase price was Kshs. 40,000/-. The then Olkejuado County



Council approved the sale and transfer on 23/12/1980. The plaintiff took possession of the land which he developed and occupied for almost fifty (50) years.

Recently, the defendants have appeared and claim part of the land which measures 0.0487 acres which they call L.R. 13977. The plaintiff fears that the defendants have ill motives and they may use unorthodox and illegal methods to dispossess him of the suit land or part thereof. He concludes by saying that if any of the defendants had any interest in any part of the land without the plaintiff's knowledge, that right has been extinguished by the plaintiff's long occupation which has exceeded the statutory twelve (12) years required for one to become entitled to such land through adverse possession. He prays that he be declared the owner of the entire land measuring 0.35 acres.

3. In support of his case, the plaintiff filed the following evidence.
 - i. A supporting affidavit dated 0/6/2016.
 - ii. Copies of receipts dated 8/12/1980, 8/1/1987 and 8/12/1980 for Kshs. 1,000/, Kshs. 4, 200/- and Kshs. 35,000/-.
 - iii. Transfer instrument dated 3/12/1980.
 - iv. Copy of map.
 - v. Copy of title for L.R. 13977 in the names of Yusuf Githinji Saleh, Hussein Githinji Mwangi, Joseph Kamau Mwangi and Francis Ruhui Macharia trading as Coro Bar and Restaurant dated 1/3/1990.
 - vi. Witness statement dated 30/6/2016.
 - vii. Four (4) photographs.
 - viii. Witness statements by Musa Junior Omare and Regina Omare both dated 26/1/2023.
4. The summons are opposed by the defendants. In opposing the summons Joseph Kamau Mwangi filed a replying affidavit dated 10/11/2016 in which he deposes as follows.

Firstly, in June 2016, they asked the plaintiff to vacate their land or in the alternative buy it from them as they are the lawful owners.

Secondly, it is not correct to say that the plaintiff has enjoyed uninterrupted occupation because there is HCCC No. 6323 of 1991 (Nairobi) where he and other defendants sued the plaintiff seeking that he be evicted from their land.

Thirdly, the plaintiff is a trespasser who should be evicted from the defendants' land.
5. In support of their case, the defendants filed the following evidence.
 - i. Replying affidavit by Joseph Kamau Mwangi dated 10/11/2016.
 - ii. Witness statement by Francis Ruhui Macharia dated 16/4/2021.
 - iii. Copy of plaint in HCCC (Nairobi) 6323 of 1991 in which the defendants were the plaintiffs and they sought the eviction of the plaintiff from L..R 13977 Ngong Town Kajiado.
 - iv. Copy of order dated 14/11/2017 showing that HCCC 6323 of 1991 was dismissed on 16/6/2016 by Mabeya Judge for want of prosecution.



6. At the trial on 13/2/2023 the plaintiff testified and produced his documents as exhibits and then called his two witnesses Musa Junior and Regina Moraa. All the three were subjected to cross –examination by the defendants’ counsel.

On the part of the defendants it is the third defendant Francis Ruhio Macharia who testified on their behalf. He produced the documents filed earlier and he too was cross-examined by the plaintiff’s counsel.

7. Counsel for the parties filed written submissions dated 2/5/2023 and 4/11/2023. The defendants’ counsel identified five (5) issues for determination as follows.
- i. Whether the applicant has been in possession of the subject property for a period of over forty one years, since the year 1980.
 - ii. Whether the applicant has erected permanent structures on the suit property.
 - iii. Whether the applicant is barred by relevant provisions of the law of Limitation to claim the property.
 - iv. Whether the respondents were rightfully allocated the land in question by Olkejuado County Council.
 - v. Whether the applicant has fulfilled the essential requirements for the orders sought and if so, is he entitled to them.

The plaintiff’s counsel in his submissions, though filed six months after the defendants’ submissions, did not identify his own issues or respond to the ones filed by the defendants’ counsel.

8. I have carefully considered all the evidence adduced in this case by both sides including the affidavits, witness statements, documents, testimony at the trial and the entire record. I have also considered the written submissions by the learned counsel for the parties including the issues identified therein and the law cited. I find that the plaintiff’s suit raises the following issues.
- i. Whether the land the plaintiff claims is 0.35 acres on 0.2989 acres.
 - ii. Whether the defendants are the registered owners of L.R. 13977.
 - iii. Whether the occupation of the subject matter by the plaintiff has been without force, without secrecy and without permission, that is to say nec vi, nec claim and nec precario.
 - iv. Whether the failure to serve the plaintiff with the pleadings in HCCC 6323 of 1991, if it be true, is material to the current suit.
 - v. Who should pay the costs.

9. On the first issue, I find that the plaintiff has not come out clearly on the exact size of the land that he claims. In paragraph 2 of the affidavit dated 30/6/2016, the plaintiff says that the land he bought from M.S. Chawla was 0.25 acres. At paragraph 5 of the same affidavit, he says that L.R. 13977 measures 0.0487 acres and in paragraph 8 he says;

8. “That in the circumstances I seek a declaration that I am the owner of the entire land measuring 0.35 acres against any claimant”.

If the plaintiff’s land is 0.25 acres and the defendants’ land is 0.25 acres and the defendants’ is 0.0487 acres, then the total acreage of the two parcels is 0.2987 acres. The difference between the land that the plaintiff claims and the total size of the plaintiff’s and the defendants’ land is 0.0513 acres. The



question that begs for an answer then is this, where does the extra land measuring 0.0513 acres come from? The plaintiff's evidence does not answer this question.

10. Regarding the second issue, the plaintiff is on record at page 44 of the handwritten proceedings of 13/2/2023 saying;

“I can see a copy of the title deed in the name of the respondents. This title deed is fake. It is nowhere in the records... I have not brought any evidence by an expert to prove that the copy is fake...”

The plaintiff was then under cross examination by Miss Waweru for the defendants. If the plaintiff doubts the authenticity of the defendants' title to the land that he claims, then he should not have filed this suit against them. He should have sued the genuine owners. It has been held in the case of *Haro Yonda Tuaje v Sadaka Dzenzo Mbauro and another* [2014] eKLR (Malindi ELC) that adverse possession cannot be claimed against a title that is claimed to be defective. It is my finding that the defendants are the registered owners of L.R. No. 13977 Ngong Town and the copy of certificate of title dated 1/3/1990 and produced by the plaintiff as exhibit (v) is prima facie evidence of such ownership within the meaning of Section 26(1) of the Land Registration Act.

11. When it comes to the third issue, I find that the plaintiff's occupation of the defendants' land No. 13977 has not been without force. It is not doubtful that his occupation has been without secrecy and without permission but when it comes to the third ingredient of the prerequisites to a successful claim for adverse possession, force has been proved. The plaint dated 16/11/1991 has the following averments.

5. “On or about the month of July, 1990 the defendant without any lawful justification started fencing the parcel of land belonging to the plaintiff”.
6. “After a warning from the Kajiado County Council, the defendant stopped the plaintiff fence but has now insisted that he is going to do the wanton acts of trespass on the plaintiff's parcel of land”.
9. “Despite demand made and notice of intention to sue given, the defendant persists in acts sued for”.

12. These averments in the 1991 suit seriously undermine the plaintiff's evidence that he occupied the suit land in 1980 and that he was not aware of the suit. Yet he is the one with the burden of proof. This suit lasted until 16/6/2016 when it was dismissed for want of prosecution. For all the period that the suit lasted, time stopped running in favour of the plaintiff. The plaintiff has therefore not proved two essential things.

13. The first is that he ever occupied L.R. 13977 without force. The second one is that such occupation without force was for 12 uninterrupted years. Even if the plaintiff had not been served with the court process, which I find he was served with, it is immaterial. As long as there was a suit challenging the plaintiff's occupation of the defendants' land, then his occupation of it was with force. The plaintiff was and still is a trespasser on the defendants' land No. 13977 Ngong Town and it is also immaterial whether he has built permanent or temporary structures thereon. This finding also covers the issue raised as number (iv) in paragraphs 8 above.

14. For the foregoing reasons, I find no merit in the plaintiff's suit. Further under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Section 3 of the Environment and Land Act I order that the plaintiff be evicted from the defendants' land, that is to say, 13977 Ngong Town on expiry of sixty (60) days if he does not vacate voluntarily therefrom. Costs to the defendants.



It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 19H DAY OF MARCH
2024.**

M.N. GICHERU

JUDGE

