



REPUBLIC OF KENYA



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**Kebande v Arasa (Enviromental and Land Originating Summons
E004 of 2022) [2025] KEELC 868 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2022**

M SILA, J

FEBRUARY 26, 2025

BETWEEN

ZACHARIAH OGARO KEBANDE PLAINTIFF

AND

PAULINE MORAA ARASA DEFENDANT

JUDGMENT

1. The plaintiff herein commenced this suit through an originating summons filed in this court on 22 June 2022 seeking the following orders;
 - a. That The plaintiff be declared entitled by adverse possession to all that portion of land measuring 0.11ha registered in the Kisii Land Titles Registry LR No Central Kitutu / Daraja Mbili / 462 in Kisii County which has been cultivated, occupied and developed by the plaintiff.
 - b. That the title issued to the defendant be cancelled and the plaintiff be registered as a sole proprietor of the portion of land known as LR No Central Kitutu / Daraja Mbili/462 situated in Kisii County.
 - c. That costs of this application be provided for.
 - d. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.
2. In support of the summons the plaintiff swore a supporting affidavit wherein he averred that he inherited the suit land from his uncle who died without having married. He averred that the land was earlier bequeathed to his uncle by his grandfather. He deposed that since the death of his uncle he has been in open continuous occupation of the suit land without interruption. He deposed that the suit land is clearly fenced and delineated on the ground and he has developed it, only that title is with the defendant.



3. In response, the defendant filed a replying sworn on 15 August 2022 wherein she asserted that the averments contained in the originating summons were deliberate falsehoods meant to mislead this court. She averred that she got registered as the owner of the suit property on the 12 October 1994 after buying it. She deposed that upon purchasing the suit property, she constructed a permanent house thereon which house still exists to date. She revealed the house currently has a tenant by the name Patrick Nyamweya Okeyo. She revealed too that she has had many and different tenants who have stayed on the said house and therefore it is a lie that the plaintiff has occupied the suit property for 28 years. She asserted that the plaintiff has not constructed any house on the suit land and neither has he cultivated it. She deposed that the only house on the suit property is that which she constructed and has a tenant, and that she has also dug a borehole which is used by her tenants. She averred that the photographs the plaintiff attached to his Originating Summons to demonstrate developments therein show the adjacent land parcel Central Kitutu/Daraja Mbili/1987. She added that the plaintiff has transferred this land parcel No. 1987 to another person. She contended that the plaintiff is a pathological liar and is trying to snatch the suit land from her.
4. Hearing commenced on 16 November 2023 with the plaintiff being the first witness. He testified that the disputed land is their ancestral land; that it was given to his grandmother by his late grandfather. He stated that his late grandfather had two wives among them being his grandmother, Kwamboka Ogaro. He stated too that his grandmother did not give birth to a son and thus she adopted his father in accordance with the Kisii customs; his father thus inherited the suit land and passed it over to him. He stated further that he has been in possession of the suit property since it was passed over to him around the year 1980 and that he constructed rental houses on it in 1986 which he rented out. He testified that he later came to discover that the land had been bought by one David Onyancha. He alleged that David Onyancha illegally purchased the suit land and that he later sold it to a cousin of his, another Onyancha, who eventually sold it to the defendant. He denied the defendant's averments that he is not in occupation of the suit land and insisted he has tenants staying in the rental houses that he built on the suit land. He also denied the defendant's claim that she has built a house on the suit land. He claimed that the defendant bought a piece of land which is next to the suit land, that is Central Kitutu/Daraja Mbili/461. He alleged that person who sold the parcel No. 461 to the defendant had already built a house thereon. He thus insisted that the defendant's house is on parcel No. 461 and not on the suit land. He testified further that both parcels No. 461 and No. 462 were sold to the defendant but the ones who sold the parcel No. 462 (the suit land) had acquired it illegally. He elaborated that one part of the suit land has his rental houses and the other part he used to plant maize. He produced the Green Card to the suit land and photographs.
5. When cross-examined by Mr. Ochwangi, learned counsel for the defendant, he stated that he discovered that the defendant had been registered as proprietor of the land in 1994 but he filed this case in 2022. He stated that in 1994 the defendant came to the land and was inspecting his houses. When he asked her what she was doing there, she told him that she has bought the suit land. However, upon insisting that the land was his, the defendant moved out of the suit land and that is why he did not file the case earlier.
6. When his pleadings were put to him, especially ground 4 where he had stated that he inherited the land from his uncle, he stated that the said statement was not true. He stated that he did not inherit the land from his uncle but from his father. He reiterated that it was his grandmother who was the proprietor of the suit property. He yielded that in as much as he had filed a succession cause in relation to his grandmother's estate, he did not present before court any document to confirm that he had done so.
7. When the green card was shown to him, he confirmed that David Onyancha was the first registered proprietor of the suit land and that the registration took place on 9 August 1973. He also confirmed



- that David Omagwa Nyachio got registered as the second owner of the suit land on 30 June 1992. He confirmed too that the names of his grandmother, his father, and his uncle, do not appear on the green card. He equally confirmed that the defendant got registered on 12 October 1994. He affirmed knowing both David Onyancha and David Omagwa Nyachio. He never inquired from David Onyancha how he came to be registered as first proprietor of the suit land.
8. He yielded that he could not tell which particular year the land was given to him by his father. He conceded that he has never sued David Onyancha or David Omagwa. He insisted however that David Onyancha and David Omagwa have never done any farming on the suit land nor even fenced the land. He stated that nobody stopped him when he was constructing rental houses on the suit land in 1986. He however yielded that he never made any attempt to establish the ownership of the suit land in 1986.
 9. Cross-examined on whether he understood the nature of his case, he testified that it is a case to assert that the defendant bought the land illegally.
 10. PW2 was one Joseph Otieno Omenda. He testified and stated that he did not know the land parcel number of the property that is in dispute but he knew where it is located. He adopted his witness statement dated 20 October 2022. In his statement he stated he lives 100 meters from the suit property. He stated further that the plaintiff, who is his cousin, inherited the suit property from his parents and built thereon rental houses. He did not know how the defendant came to be registered as proprietor of the suit land but he thought that it must have been through fraud because the property has always been the plaintiff's family land. He urged the court to grant the plaintiff title to the suit land as he has always been in occupation of the land and has developed it.
 11. When Cross-examined by Mr. Ochwangi, counsel for the plaintiff, he conceded that he did not know the parcel number of the suit land and has never seen its title. He also did not know who is its registered proprietor. He however stated that he knows its location. He stated that the plaintiff wanted to build on the land but was stopped and informed that he does not own the land. He however could not recall which year this occurred. He revealed that even though the suit land used to be owned by his grandmother, Kwamboka Ogaro, he did not know whether she ever got registered as proprietor. Re-examined, he elaborated that it was the defendant who stopped the plaintiff from developing the land.
 12. PW- 3 was Zedekiah Mekenye Menda, a cousin of the plaintiff. He stated that he knows the location of the suit land but does not know its parcel number. He stated that the land was wrongly sold to the defendant without the plaintiff's knowledge. According to him, there is nothing developed on the suit land. He stated further that even though plaintiff has some houses the same are behind the disputed land. He also adopted his witness statement dated 20 October 2022 as his evidence in chief. In his statement, he had stated that the plaintiff is his cousin who lives some 200 meters from his home. He revealed that his grandfather had three wives; that the third wife did not give birth to a male child and as such adopted the plaintiff's father, one KEBANDE, and gifted him the suit land. Subsequently, the plaintiff's father proceeded to pass the land to the plaintiff who constructed rental houses thereon.
 13. When Cross-examined by Mr. Ochwangi, he insisted that there is no development on the land that is in dispute. He stated the land was previously owned by his grandfather called Ogaro Chweya. He however conceded that he has never seen any document showing that Ogaro Chweya was registered as proprietor. He stated that the plaintiff wanted the land to get back to him since it was wrongly sold.
 14. PW-4 was one Jacob Momanyi Ogaro. He stated that the plaintiff is a son to his late brother, Joel KEBANDE Ogaro. He claimed the plaintiff inherited the suit land, land parcel Central Kitutu/Daraja Mbili/462 from his grandmother, one Kwamboka. He stated too that he does not know the defendant. He stated equally that the person who is in occupation of the land is the plaintiff. He went on to state that he does not visit the land because he is old and cannot move around much. It was his testimony



- that he does not know of anyone claiming the suit land apart from the plaintiff. It was his testimony that there are some residential buildings on the land which belong to the plaintiff and rent is paid to him. He thus urged the court to give the plaintiff the title to the land.
15. During Cross-examined by Mr. Ochwangi he stated that he is over 80 years old and has only been to the suit land once, in 1986. He did not have any document to show that the land was given to the plaintiff by his grandmother. He acknowledged that he does not know the parcel number of the land and has never seen its title deed. He has never heard of David Omagwa Nyachiro nor the defendant.
 16. With the above evidence the plaintiff closed his case.
 17. DW1 was the defendant and she called one other witness. She stated that she stays in Nakuru but she is originally from Kisii. She stated further that she does not know Zacharia Ogaro KEBANDE, the plaintiff herein. She equally stated that the suit property is registered in her name and that she holds its original title. She elaborated that her husband bought the suit land through Sopau Enterprises wherein 'Sopau' meant Sospeter and Pauline. She stated that upon the title in respect of the suit property being transferred to her name, she developed it and planted a K-apple fence around it. She revealed that she has also dug a well on the land. She testified that the person who lives on the suit land is her tenant by the name Patrick Nyamweya Okeyo. She denied the plaintiff's claim that he lives on the suit land. She stated that the land was sold to her by one David Omagwa Nyachiro whose name she confirmed was on the Green Card. She produced a copy of the green card as an exhibit in support of her case. She equally produced receipts for rent paid by the tenant. She further produced photographs of her house constructed on the suit land. She testified further that the plaintiff has never gone to her claiming that the suit land was given to him by his grandmother. When shown the photographs filed by the plaintiff, she stated that the houses on the photographs are not on her land and insisted that her plot has only the one house which she developed and has a tenant.
 18. During Cross-examination by Ms. Gogi, the learned counsel for the plaintiff, she stated that the buyer in the sale agreement was Sopau Enterprises and that she had a document showing her relationship with Sopau Enterprises. She proceeded to produce a Business Registration Certificate showing Pauline Moraa w/o Sospeter Gwara and Sospeter Gwara as its proprietors. She revealed that it was her husband, Sospeter who wrote the sale agreement. She reiterated that the houses shown by the plaintiff are not on her land and that she did not know when these houses were built. She reiterated that she did not have an issue with the plaintiff's houses because the same are not built on her land but are on the adjacent land.
 19. DW 2 was one name is Moiro Ayieko Stanslaus, who introduced himself as a caretaker of the defendant's plots in Kisii. He asserted that the defendant is the owner of the suit property and has developed it. When shown the photographs filed by the defendant, he confirmed that it depicted the house built by the defendant. According to him the photographs produced by the plaintiff showing other developments are not of the suit land.
 20. When cross-examined by Ms. Gogi, he yielded that he did not know the size of the suit land. He however insisted that he knows how the ground and that the houses in the photographs presented by the plaintiff are outside the defendant's plot.
 21. With the above evidence, the defendant closed his case and I invited counsel to file their submissions within 14 days.
 22. I need to mention that only counsel for the defendant filed his submissions within the given time and before the date for confirmation of filing submissions, the plaintiff lodged an application seeking to reopen his case in order to introduce a surveyor's report. I heard the application and dismissed it, principally for reason that the report had been discovered but the plaintiff chose not to produce it. I



did not think that the discretion to allow additional evidence after closure of a hearing was to allow a party to fill in gaps created by the defendant. Upon dismissal of the application counsel for the plaintiff proceeded to file her submissions. I have given the submissions filed due consideration and hold the following view of the matter.

23. The case of the plaintiff is that the land was ancestral land that was owned by his grandmother and was thereafter passed to him. He averred that in 1986 he built rental houses on the suit land which he demonstrated through photographs. It was his position that he has been on the suit land for over 12 years, uninterrupted, thus entitled to the suit land by way of adverse possession. He also seemed to press a case that the title of the defendant was acquired illegally as her predecessors had no entitlement to the suit land in the first place, given that it was the ancestral land of the plaintiff.
24. The position of the defendant is that what the plaintiff has built is on adjacent land and not the suit land. She asserts that the suit land was properly purchased and she has good title to it.
25. At the outset, let me say that I do not have before me a case relating to an illegal acquisition of title by the defendant. What I have is a case for adverse possession. The claim that the defendant and her predecessors never had good title to the suit land is not for determination here. I will therefore stick to the claim for adverse possession on the basis that the legal title is held by the defendant.
26. To prove adverse possession, the plaintiff has to demonstrate that he has been in possession *nec vi, nec clam, nec precario*, that is without violence, without stealth and without permission, for a continuous uninterrupted period of 12 years.
27. The burden of proof pursuant to Section 107 (1) of the [Evidence Act](#), Cap 80, Laws of Kenya, is on the one who asserts. The said provision of the law is drawn as follows:

S.107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
28. In our case, it is the plaintiff who has come to court insisting that there are certain facts which exist that support his contention that he has been on the suit land for a period of 12 years uninterrupted. A large part of the plaintiff's case is based on the assertion that he has been cultivating the suit land and has built some rental units on it which he demonstrated through photographs. The position of the defendant is that those photographs are not of the suit land but are of adjacent land. The plaintiff herself produced her own photographs, showing a single house, which she asserted is the correct depiction of the suit land.
29. Now, this is clearly a case of one person's word against the other. Whereas the plaintiff insists that the photographs he produced are the photographs of the suit land, the defendant insists that the photographs she produced are the correct photographs of the suit land. At the level of one person's word against the other, the scales are level. The only way that the plaintiff would have tilted the scales would have been to provide a surveyor's report to demonstrate that indeed the houses shown in the photographs of the plaintiff are actually on the suit land and that they have been there for a period of at least 12 years. That in my opinion is the only way that the plaintiff would have attained the standard of proof, which is on a balance of probabilities. Without a report, this court cannot with certainty say that the houses he has exhibited in his photographs fall on the suit land. And without that fact being established, it cannot be said that the plaintiff has proved his case on a balance of probabilities. We cannot run away from the reality that the defendant also has a photograph of a house which she has rented out to a tenant and which she insists that it is the only house on the suit land.



30. There is really no point of saying more. The long and short of it is that the plaintiff has failed to prove his case on a balance of probabilities and his case is dismissed with costs.

31. Judgment accordingly.

DATED AND DELIVERED THIS 26 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Gogi for the plaintiff

Mr. Ochwangi for the defendant

Court Assistant – Michael Oyuko

