



**Obare & 3 others v Mudhuongo (Civil Appeal 194 of 2019)
[2024] KECA 1492 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1492 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 194 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
OCTOBER 25, 2024**

BETWEEN

**MARGARET OBARE 1ST APPELLANT
MAURICE OTIENO OMONDI 2ND APPELLANT
EZEKIEL NYANGABO HOLOGO 3RD APPELLANT
PETRO ADIPO HOLOGO 4TH APPELLANT**

AND

LUCAS OWINO MUDHUONGO RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Kisumu (Odeny, J.) dated 10th May 2019 in Case No. 484 of 2015)

JUDGMENT

1. The respondent, Lucas Owino Mudhuongo, was the plaintiff in the Environment and Land Court (ELC), where he had sued Margaret Obare, Maurice Otieno Omondi, Ezekiel Nyangabo Hologo, and Petro Adipo Hologo (the 1st, 2nd, 3rd and 4th appellants herein), seeking general damages; and orders that the appellants be evicted from Land Parcel No. Uholo/Ugunja/300 measuring 5.5 hectares; and be restrained by themselves, proxies and or agents, from entering, remaining, cultivating or developing or in any way using the said parcel, as he was the registered owner of the said suit land, which he inherited from his grandmother Lucia Awuor Omollo (Lucia). He maintained that Lucia had obtained grant of letters of administration in respect of her late husband, Okoth Omollo's estate and subsequently transferred the suit land to her name on 24th July 2001, and thereafter, in the course of her lifetime, she transferred it to the respondent on 20th February 2006. Ultimately, Lucia died on 24th July 2011.



2. It would appear that in the course of time, Maurice Otieno Omondi died, and Petro Adipo Hologo, did not pursue the appeal. From the memorandum of appeal. The persons appealing are Margaret (1st appellant) and Ezekiel (2nd appellant).
3. At the ELC, the respondent complained that the appellants had illegally encroached onto a portion on the suit land; constructed their homes, cultivated, fenced off and annexed portions of the land, thus denying him access to, user and enjoyment of the same. This being a first appeal, under rule 31(1) of this *Court's Rules* our primary duty is to evaluate the evidence on record in order to come to our own independent conclusion on the evidence and law. This position has been reiterated in several decisions including *Abok James Odera t/a A. J. Odera and Associates v Patrick Machira t/a Machira and Co. Advocates* [2013] eKLR.
4. The 1st appellant and the late Maurice, who were siblings, while confirming that they were in occupation of one acre of the parcel, contended that they were in lawful occupation having entered into an agreement; and purchased the same at a consideration of Kshs.35,000/- from Amon Okoth Omollo and Lucia Omollo in 1999, although they did not get a title deed. The purchase price was paid in the form of cash Kshs.9, 000/=, and a white bull, sheep, wheat flour, beans and sugar; and the 1st appellant also gave Kshs.17, 000/= to Amon Okoth, who died 6 months after; and that apparently, the 1st appellant did not know that Amon did not have title. She eventually constructed on the suit land in the year 2000.
5. According to the 2nd appellant, the suit land in question originally belonged to his grandfather, the late Adipo Kaol, and the ownership later devolved to him as the heir and he was therefore rightfully in possession; that Lucia should never have transferred that land to the respondent who hailed from a different location, and was merely a grandson in that home.
6. In his statement which was adopted as his evidence, the respondent informed the trial court that his late grandfather Absalom Omolo Adipo, was the registered absolute proprietor of land parcel in question; that from the year 1965 when he was born, he had lived with his mother and grandparents on the said parcel, and only moved out in the year 2000 when he constructed his own home. The respondent's grandfather, Absalom Omolo Adipo, fell ill in 1971 and eventually died on 23rd April,1972; however just before his death, he convened a meeting on 20th April, 1972 and those present including the late Eliakim Okoth and Elisha Ochieng', to ensure that his grandchildren, including the respondent, were provided for.
7. It was his further evidence that in the year 1998 he got to learn that one Amon Okoth Omolo was attempting to sell a portion of the said land parcel No. Uholo/Ugunja/300 to Margaret, and when he enquired from his grandmother, Lucia Awuor Omolo, she denied such plans; in the year 2000 the respondent assisted his grandmother to apply for a grant of letters of administration to the estate of Absalom Omolo Adipo; and the grant was issued and confirmed. The said parcel of land was eventually transferred to the name of Lucia Awuor Omolo as the sole beneficiary of Absalom's estate; and ultimately his grandmother Lucia transferred the property to him in February 2006. Meanwhile the appellants moved to occupy portions of the land, and his efforts to remove them through the area chief, yielded nought; and he eventually filed the suit.
8. The learned trial judge adopted the statement by PW2, a 68 year old Meshack Adeg, one of the sons of the late Alexander Wire Adipo, and a brother to the late Absalom Omolo Adipo (Absalom). We find it necessary to reproduce, albeit in a paraphrased manner a large portion of the content to help place matters in perspective. The witness described Absalom as the registered absolute proprietor of land parcel No. Uholo/Ugunja/300; that he had only one daughter Joice Adhiambo Omolo, who married



Joseph Mudhuongo Jaling' of Murumba, Kathieno 'B' Sub- Location, East Ugenya Location; that the respondent was the grandson to Absalom; that the only beneficiaries of the estate of the late Absalom Omolo Adipo were his wife Lucia Awuor Omolo (now deceased) and his daughter, Joice Adhiambo Mudhuongo; that after the death of Absalom Omolo Adipo, this witness confirmed the chain of events leading to the eventual transfer of the said parcel of land to the respondent as the sole beneficiary who eventually transferred the parcel to her grandson, Lucas Owino Mudhuongo, instead of her daughter who was the sole beneficiary.

9. The witness had explained in his statement that Adipo Kaol had four sons, Absalom Omolo Adipo, Hologo Adipo, Nyango'r Adipo and Alexander Wire Adipo, all of whom were born at Nyamasare; the said Adipo Kaol later migrated from Nyamasare together with three of his sons Absalom Omolo Adipo, Nyango'r Adipo and Alexander Wire Adipo, and settled at Sira Village, Uholo West; both Adipo Kaol and his son, Absalom Omolo Adipo, died and were buried at Sira Village, whilst Nyango'r Adipo and Alexander Wire Adipo (PW2's father) migrated from Sira Village, Uholo, and settled in Migori County, where both of them died and were buried. However, Hologo Adipo never settled at Sira Village at all; instead, he migrated from Nyamasare and settled and had his home in Alego, where he died and was buried.
10. Further, that the said Hologo Adipo had three sons, namely, Ong'eche, Petro Adipo Hologo and Ezekiel Nyang'ao Hologo (2nd appellant), all of whom were born in Alego where they had their home and land which they inherited from their father, Hologo Adipo. Both Petro Adipo Hologo and Ezekiel Nyang'ao Hologo as well as their late father, Hologo Adipo, have their own pieces of land in Alego and at Nyamasare; and they do not have any share in the estate of Absalom Omolo Adipo at Sira Village.
11. Ezekiel, the 2nd appellant testified and stated the portion of land he and five other families occupied belonged to their common ancestor Adipo and that even his grandfather was buried there; however, conceding when his own father died, he was buried in Alego; and that he only moved onto the parcel as an adult. He argued that the respondent deliberately failed to disclose to the court that the suit property is the home to other seven (7) generations of the Adipo Aol ancestry; and that respondent did not even know its history.
12. The trial court formulated the issues for determination as, firstly, whether the respondent is the absolute owner of the suit land, secondly, whether the appellants were trespassers on the suit land and, thirdly whether the respondent was entitled to the orders sought.
13. The trial court having carefully considered the parties' pleadings, testimony, and evidence on record addressed the issue whether the respondent was the absolute owner of the land, and whether the appellants were trespassers. The learned trial Judge found that it was not in dispute that the respondent was the registered owner of the suit land, having been registered as such on 20th February 2006, making him the absolute owner. In this regard, the learned judge drew from the provisions of section 26 of the [Land Registration Act](#) 2012, which provides that a certificate of title issued by the Registrar- upon registration, or to a purchaser of land upon a transfer of transmission by the proprietor, is the absolute and indefeasible owner, shall be taken by all courts to be prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner. The learned judge acknowledged that such title can be impeached on grounds of having been acquired through fraud, misrepresentation or illegally or un-procedurally.
14. The trial court went on to find that the validity of respondent's title had not been questioned as the 2nd appellant and Petro did not plead any particulars of fraud nor counter claimed for ownership of the parcel of land, and their only claim to the land was through ancestry which could not defeat rights of a registered proprietor.



15. On the issue raised by the respondent's contention that the Land Disputes Tribunal acted in excess of their mandate, in subdividing the portion of the suit land to the appellants the court was clear that the tribunal did not have the jurisdiction for the action of subdivision.
16. The court pointed out that the appellants having admitted to be in occupation of the suit land amounted to trespass; that the 1st appellant having bought the land from a person who did not have good title, rendered the sale null and void; that trespass being actionable per se, and once proved did not require proof of the injury suffered due to the trespass; and awarded the respondent a total sum of Kshs100,000/ as a reasonable figure as general damages.
17. The trial court found that the respondent had proved his case to the required standards as against the appellants and granted the reliefs as sought by the respondent.
18. The appellants, aggrieved by the decision of the trial court, filed their memorandum of appeal challenging the judgment of the Environment and Land Court on 6 grounds that:
 - i. the learned judge: completely misunderstood the evidence before him, wrongly analysed the evidence thus ordering the appellants to give vacant possession of parcel in question to the respondent within the next 45 days failure of which eviction to Issue;
 - ii. erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made on behalf of the appellants thus reaching to a conclusion that was contrary to the evidence before him;
 - iii. erred in fact and law in finding and holding that parcel in dispute was registered in the name of the Lucas Owino Mudhuongo and that the legal requirements for such registration had been met, as the suit land is ancestral and the entire extended family were excluded from the succession process;
 - iv. erred in fact and law in failing to put into consideration the fact that the appellants and their families have lived and cultivated the portion of one (1) acre of the said parcel of land for decades having inherited the same from their forefathers, thus the orders of vacant possession and eviction granted were malicious, and unconstitutional;
 - v. failed to appreciate the history of Parcel No. Uholo/Ugunja/300 being that the said parcel of land was indeed an ancestral land which was allocated to all the dependants of the Adipo Aol in equal shares and not only the respondent therefore the registration of the entire parcel into the respondent's name as the sole owner was in fact unconscionable & unlawful;
 - vi. totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.
19. The appellants thus pray that that this appeal be allowed and that the Judgment of the learned judge be set aside and the appellants be declared as the lawfully owner of one (1) acre of Land Parcel No. Uholo/Ugunja/300.
20. The appellants crystalized these grounds into three thematic areas, as follows:
 - i. Whether the appellants are innocent purchasers for value: It is the appellants' contention that the 1st appellant bought the suit parcel from Okoth Omollo and Lucia Omollo in 1991 having paid the full purchase price, being unaware of any defect in title as it were.
 - ii. Whether the land was held in trust by Absalom Omollo Adipo: Notably the suit property was registered in the name of Absalom Omolo Adipo alone (who was the son of Mzee Aol, and



he apparently had had four (4) other brothers, namely Hologo Adipo (2nd appellant's father), Alexander Wire Adipo, Odera Adipo and Nyang'or Adipo. In this regard, it is contended that the 2nd appellant, Petro, the respondent and Absolom Omollo Adipo, the registered owner of the suit property were of the same ancestry, and as such Absolom held the property in trust for the larger family. In support of this argument, they rely on section 28(b) of the LRA.

- iii. Whether the land parcel ought to transmit to the 1st appellant by adverse possession: the appellants submit that the family has lived and cultivated the portion of the suit land for a century having acquired the same lawfully and as such the orders of vacant possession are malicious and unconstitutional, and that at the time of filing suit she had been in occupation for over 15 years and as such adverse possession was available to the 1st appellant.
21. The respondent, in opposing the appeal, submits that the appellants have not demonstrated how the learned Judge "misunderstood the evidence" or "wrongly analyzed the evidence", or failed "to appreciate the totality of the evidence ... and the submission made on behalf of the appellants" or reached "a conclusion that was contrary to the evidence" or "totally misunderstood and wrongly evaluated the evidence", as there was evidence demonstrating that the said parcel of land was indeed registered in the name of the respondent.
 22. The respondent points out that the trail leading to registration of the parcel in his name were well set out in the evidence, starting from the Green Card which showed that Absalom Omolo Odipo was the first registered proprietor of land parcel No. Uholo/Ugunja/300; that upon his death, his widow, Lucia obtained a Grant of Letters of Administration in respect of his estate and caused the whole parcel to be transferred to herself on 24th January, 2001 as shown in the Green Card; thereafter on 24th July, 2001 she transferred the same to the respondent. It is the respondent's contention that these were the legal steps required, and it has not been demonstrated that there was anything done or omitted by the respondent which was illegal or irregular or fraudulent.
 23. As for the 2nd appellant and his sibling, it is submitted that they failed to prove that the land parcel was not only ancestral land, but was also bequeathed or devolved to them. The respondent pokes holes in their claim that "the entire extended family were excluded from the succession process" saying it has no legal basis.
 24. As regards the assertion that that the 2nd appellant, Petro, and their families have lived on and cultivated a portion of suit property measuring one (1) acre for decades having inherited the same from their forefathers, the respondent points out that no evidence was led to show how they inherited that one acre; that even if they had been occupying that one acre, they did not explain how the whole parcel was registered in the name of Absolom Omolo Adipo only. Further, that if indeed they were entitled to that portion under customary law, then they had many options open to them including:
 - i. pleading in the court below that the one acre was held in trust for them;
 - ii. filing a claim against Absalom during his lifetime,
 - iii. filing an objection in Siaya SRMC Succession Cause No. 37 of 2000 against the distribution of the estate of Absolom; Another issue that has been raised is, filing a counterclaim in the court below, yet, they did not take any of these options.
 25. As regards the 2nd appellant's claim that the suit parcel of land was indeed ancestral land which was allocated to all the dependents of Adipo Aol in equal shares, the respondent refers us to the evidence of PW2 that whereas two of the sons of Adipo Aol, namely Nyang'or Adipo and Alexander Wire Adipo had initially settled at Sira Village, they later on migrated to Migori County where they settled and



were buried; and in the end, only one son of Adipo Aol settled and was buried at Sira Village, on the disputed parcel of land, and this was Absalom Omolo Adipo.

26. In relation to the onus of proof concerning a claim to land on the basis that it is ancestral, the respondent draws from a decision he describes as being of persuasive value, in the case of *Edward Makori Oganga and Stephen Amwolma Gogo v John Ayienda Orangi, Jacques Orangi Ayienda, Donald Bosire Enda & The Honourable Attorney General* (Kisii ELC No.466 of 2015), where land was also alleged to be ancestral land, Mr. Munyao J, stated at paragraph 25 of the judgement that:

“Probably it would have assisted the 2nd and 3rd Defendants to call witnesses who had actual knowledge of the dispute during adjudication, or bring proceedings related to the dispute. Since it was their assertion that the land was ancestral land bequeathed by their grandfather, the onus was on them to prove that allegation. This was affirmed in the case of *Jackson Mwiti M'Rinyiru v Silas M'Rinyiru Mbui* (2020) eKLR, cited by Mr. Marita, where the court stated as follows: “Thus, it was not sufficient for the appellant to state that the suit land belonged to their grandfather. He was duty bound to adduce evidence to support his claim, which evidence did not meet the threshold of a customary trust on a balance of probabilities.”

The respondent urged us to dismiss the appeal with costs to be awarded to him.

The main issues in this Court's view in this appeal are:

i. Who is the registered owner of the suit property?

27. The crux of the appellants' case is that the 1st appellant purchased a portion of the suit land from Omollo Okoth and his wife, Lucia, in 1999. In the trial court, the case presented by the 1st appellant herein and her late brother Maurice Otieno Omondi, was that they were innocent purchasers for value, having purchased 1 acre of the land parcel in question from one Amon Okoth Omolo, on 14th January, 2000 and they produced a sale agreement. However, the loophole in this transaction is that Amon Okoth Omolo was not the registered proprietor of that parcel of land, and that he was also not the legal representative of the estate of Absalom Omolo Adipo.
28. The evidence presented via the Death Certificate shows that Absalom Omolo Adipo died on 23rd April, 1972; subsequently, the Certificate of Confirmation of Grant dated 17th January, 2011 in respect of his estate was issued to Lucia Awuor Omolo in Siaya SRMC Succession Cause No. 37 of 2000. As pointed out by the respondent, this means that as at 14th January 2000 when the 1st appellant and her brother were purporting to purchase a portion of the suit property, no one had been appointed to administer the estate of Absalom Omolo Adipo. We have no hesitation in finding that the transaction was illegal and did not confer any property on the 1st appellant and her brother, and smirked of intermeddling in the deceased's estate.
29. The testimony of Meshack, PW2, clarified that the 2nd appellant and Petro were sons of Hologo Adipo (a brother to Absalom) and therefore nephews of Absalom; and not beneficiaries of the estate of Absalom Omolo Adipo; and that the issue about their being excluded from the succession process did not, therefore, arise. Absalom Omolo Adipo was survived by only his wife, Lucia Awuor Omolo, and one child, Joice Adhiambo Mudhuongo (the mother of the respondent). We concur with the respondent's argument that even in terms of the degrees of consanguinity, the deceased's wife and daughter ranked above the 2nd appellant and Petro, and there was no legal requirement to include them, or even consult them or seek their consent before Lucia Awuor Omolo applied for the grant of letters of administration.



30. We further note that indeed, there was no evidence led to suggest that the register for the said parcel of land showed that the suit parcel of land was allocated to the dependents of Adipo Aol in equal shares. From the evidence of Meshack, PW2 (each of the four sons of Adipo Aol (Absalom Omolo Adipo, Hologo Adipo (the father of Ezekiel and Petro), Nyangor Adipo and Alexander Wire Adipo, each had their own parcels of land in different places. As pointed out by the respondent, only the sons of Hologo Adipo specifically 2nd appellant and Petro were claiming the suit parcel No. Uholo/Ugunja/300. The 2nd appellant's explanation for this is that Nyang'or Adipo and Alexander Wire Adipo had "forfeited their beneficial interests and relocated elsewhere". In reaction to this, the respondent contends that the real reason the 2nd appellant and Petro moved into and occupied the disputed parcel of land is because the original owner Absalom Omolo Adipo did not have any male offspring, and they believed that the respondent was a stranger to them; that the appellant and Petro were also unhappy because the respondent is a grandson from the deceased's daughter and that the respondent's mother could only have been entitled to the land if she was suffering from want of land and property.
31. Whereas this line of reasoning appears speculative, it stirs some curiosity as to what was driving the Hologo brothers, as there is nothing in the record to suggest that if they missed out on the parcel in question, they would be rendered landless. This is further fortified by the evidence of Meshack (PW2), which was neither challenged nor contradicted, that each of the four sons of Adipo Aol were given land which they inherited from Adipo Aol. The disputed parcel of land is situated at Sira Village, Uholo, which Adipo Aol gave to his son Absalom Omolo Adipo.
32. We note from the evidence on record that Absalom Omollo Odipo was the first registered proprietor of the suit property as per the green card on record, and that when he died his wife, Lucia, obtained grant of letters of administration in Siaya SRMCC Succession Cause No. 37 of 2000, and subsequently the suit property was transferred to Lucia on 24th January 2001, and. on 24th July 2001 Lucia transferred the suit property to the respondent in the course of her lifetime. Lucia died on 24th July 2011.
33. This Court, in *Wambui v Mwangi & 3 Others* (Civil appeal 465 of 2019)[2021] KECA 144(KLR) (19 November 2021) (Judgment), held that the sanctity of title vested in a title holder under section 25 and 26 of the *Land Registration Act* not only takes precedence over all other alleged equitable rights appurtenant thereto, but it is also absolute and indefeasible and challengeable on grounds of fraud or misrepresentation to which the owner is proved to be a party.
34. This Court notes that from the pleadings on record, the appellants did not plead the particulars of fraud, nor have the appellants proved that the title was illegally acquired. This Court also notes that from the 1st appellant's evidence with regard to consideration, she paid Amon Okoth some Kshs.17,000/=. Amon died 6 months after. This Court agrees with the respondent that the argument that the 1st appellant purchased the portion of the suit property from Amon is not true, as the sale agreement is dated 14th January 2000 when Lucia was still alive, so the 1st appellant was buying the portion of the suit land from someone with no right to pass title as the registered proprietor was still alive. If there was any claim by the appellants the same should be addressed to Amon Okoth's estate.
35. We also note that the 2nd appellant and his brother never put in objection proceedings in the succession case in line with their agreement that the suit land was ancestral. It is not enough for them to claim that the land was ancestral but needed to adduce evidence in support of the same which the appellants did not. Further on the issue of jurisdiction this Court agrees with the trial court and the respondent, that the same was not submitted on but cropped up due to documents relied on by the appellants and as such cannot be determined by this Court.



(ii) Was the relief of adverse possession available to the appellants?

36. The burden of proof is placed on the person alleging the occurrence of an event. Owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher and lays squarely on the respondent to demonstrate that he has met the requirements for grant of an order of adverse possession. The respondent is the one who has alleged and must prove. (See COA App No. 95 of 2014 *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR.
37. This Court (differently constituted) in Kisumu Civ. App. No. 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR held that a person claiming adverse possession must establish the following:
- i. On what date he came into possession.
 - ii. What was the nature of his possession?
 - iii. Whether the fact of his possession was known to the other party.
 - iv. How long his possession continued and
 - v. That the possession was open and undisturbed for the requisite 12 years.
38. To determine the nature of possession the court in Kisumu Civil Appeal No. 27 of 2013 *Samuel Kihamba v Mary Mbaisi* [2015] eKLR held:
- “strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that the has occupies the land openly, that is, without force, without secrecy, and without license or permission of the landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”
39. That said, this Court notes and is in agreement with the trial court, that the appellants did not bother to counter claim the ownership of the portion of the suit land claiming adverse possession, and as such this relief is not available to the appellants.
40. Ultimately, from the foregoing, it is our conclusion that the appeal lacks merit and is dismissed with costs to the respondent.

DateD AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

