



**Owiti & another v Pambo & 4 others; Real People Kenya Limited  
(Interested Party) (Environmental and Land Originating Summons  
19 of 2021) [2024] KEELC 4138 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4138 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 19 OF 2021**

**AY KOROSS, J**

**MAY 23, 2024**

**[ORIGINALLY KISUMU ELC CASE NO. E 8 OF 2021 (OS)]**

**BETWEEN**

**FLORENCE ATIENO OWITI ..... 1<sup>ST</sup> PLAINTIFF**

**MILDRED APIYO AIRO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PERES ONAM PAMBO ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE ODHIAMBO PAMBO ..... 2<sup>ND</sup> DEFENDANT**

**STEVEN AWITI PAMBO ..... 3<sup>RD</sup> DEFENDANT**

**VITALIS OMONDI ODHIAMBO ..... 4<sup>TH</sup> DEFENDANT**

**ERICK ODIWUOR OPOT ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**REAL PEOPLE KENYA LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. On 14/07/2022, this court granted the plaintiffs leave to amend their Originating Summons (OS) dated 3/03/2021. In the amended OS that was the subject of leave, the plaintiffs who are co-wives and widows to John Owiti Onguru (Onguru) sought to be deemed the registered proprietors of land parcel no. Sakwa/Barkowino 4352 (currently registered as Sakwa Barkowino/8761 and 8762). Sakwa/Barkowino 4352 shall from now on be referred to as the suit property.
2. The plaintiffs raised the following issues for this court's determination: -



- a. Was Pambo Maurice Onyina (deceased) registered as the proprietor of the suit property?
  - b. Had a grant of letters of administration been taken out in respect of the estate of the said Pambo Maurice Onyina?
  - c. Had the plaintiffs acquired the suit property by adverse possession?
3. Upon raising the issues, the plaintiffs sought it be declared that Pambo Maurice Onyina's (Onyina) rights over the suit property were extinguished in 1992 upon expiration of 12 years from 1980 when the plaintiffs took possession and a declaration the defendants acquired the suit property by fraud, misrepresentation or deceit for succeeding Onyina's estate without making disclosures that the suit property had already been sold.
  4. They also sought a declaration that they should be deemed as adverse possessors of the suit property and time be calculated from 1978, an order that transactions creating Sakwa Barkowino/8761 and 8762 (subdivisions) be cancelled for being void ab initio and be reverted to Onyina, by the ensuing orders of this court, the plaintiffs be registered as the proprietors of the suit property and, lastly, sought for costs.
  5. The OS was maintained by the supporting affidavit of the 1<sup>st</sup> plaintiff Florence Atieno Owiti who deposed it on 3/03/2020 together with a further affidavit sworn on 4/10/2022.
  6. In opposition, the 2<sup>nd</sup> defendant with the authority of the 3<sup>rd</sup> defendant filed a replying affidavit deposed on 22/02/2022 and according to him, they were Onyina's children, and the 1<sup>st</sup> defendant who was their mother died on 14/10/2006 which was long before the suit was filed.
  7. The 4<sup>th</sup> defendant who was represented by the firm of M/s.O.H. Bunde & Co. Advocates filed a replying affidavit sworn on 17/01/2023 in which he asserted he was the registered proprietor of land parcel no. South Sakwa/ Barkowino/8761 having acquired title on 25/1/2022 which was during the subsistence of this suit.
  8. In addition, he also filed a counterclaim dated 17/01/2023 whereby he sought orders that he be declared the owner of South Sakwa/ Barkowino/8761, the plaintiffs' eviction, permanent injunction against them, general damages, interests, and costs.
  9. In opposing the amended OS, the 5<sup>th</sup> defendant filed a replying affidavit sworn on 12/05/2023 and according to him, he was the proprietor of South Sakwa/ Barkowino/8762 having purchased it when it was vacant. The interested party did not participate in these proceedings.

### **Plaintiffs' evidence**

10. The suit proceeded by viva voce and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively testified as PW1 and PW2 and their evidence was led by Phoebe Adhiambo Oyugi who testified as PW3.
11. The 1<sup>st</sup> plaintiff's evidence was composed of her affidavits and documents that she produced and were marked as Pex.1- 8 which were composed of grant of letters ad litem in respect of Onguru's estate, sale agreements, certificates of interpretation, and green cards of land parcels no. South Sakwa Barkowino 503, 8762, and 8761 and photographs.
12. It was her testimony that according to Pex.2, Onguru purchased a portion of Sakwa Barkowino 503 (mother parcel) measuring 0.27 ha from Onyina whose consideration was ksh.1600/-. According to her, the mother parcel was subdivided to create the suit property.



13. It was her case that the agreement for sale that they entered with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who were Onyina's sons and produced as Pex.3 was a testament to the existence of Pex.2 and they had always had exclusive and uninterrupted occupation of the suit property.
14. She further testified South Sakwa Barkowino 8762 and 8761 were irregularly created with the 5<sup>th</sup> defendant trespassing on one of the parcels in 2020 and the 4<sup>th</sup> defendant on the other parcel on 12/02/2022 whereby he demolished the plaintiffs' structure.
15. On cross-examination it was her evidence that Pex.2 demonstrated there was a balance of the purchase price of Kshs. 1400/- which was never paid and although Onyina and Onguru had dealings over other parcels of land which Onguru had purchased, all were transferred except the suit property and she had been untruthful.
16. Further, she testified the structure had before its demolition been rented to PW3 and that Onguru purchased the entire mother parcel. She stated she was not aware the mother parcel had been subdivided severally and the portion which is occupied by the 5<sup>th</sup> defendant had her structures which were later on demolished by the 5<sup>th</sup> defendant's cattle.
17. Pw2's evidence which was contained in her witness statement filed on 3/03/2021 corroborated Pw1's evidence in chief. On cross-examination, she stated she and the 1<sup>st</sup> plaintiff witnessed the execution of Pex.2 but on being pressed further, she retracted this line of evidence and stated that contrary to her statement, it was the 1<sup>st</sup> plaintiff who collected rent and not her.
18. Pw3 who was allegedly the plaintiffs' tenant adopted her statement filed on 17/03/2023 as her evidence in chief and stated she had been a tenant of South Sakwa Barkowino 4352 from 1994. She stated it had since been subdivided and that she had always paid rent to the 1<sup>st</sup> plaintiff before the untimely demolition of the structure on 12/02/2022 by the 4<sup>th</sup> defendant.
19. On cross-examination, it was her testimony she never entered into a formal tenancy agreement and she did not know if the person who ejected her from the suit property was an agent of the 4<sup>th</sup> defendant. She further testified that cows demolished other structures.

### **2nd and 3rd defendants' evidence**

20. The 2<sup>nd</sup> defendant testified as Dw1 and his evidence was contained in his replying affidavit, witness statement filed on 23/02/2022, and Onyina's and 1<sup>st</sup> defendant's death certificates which were produced as Dex.1 and 2. It was his evidence the 1<sup>st</sup> defendant who was his mother died on 14/10/2006 and Pex.2 was executed long before the existence of South Sakwa Barkowino 503 and there was no evidence the balance of the purchase price was ever paid.
21. He further testified the claim of adverse possession had been presented over a non-existent parcel of land and that they did not recognize Pex. 2 and that was why he and the 2<sup>nd</sup> defendant executed Pex.3.
22. It was his additional testimony that the plaintiffs' claim of adverse possession could not stand as they entered the suit property with permission from the owner.
23. On cross-examination, he testified the parcels of land in dispute were the subject of probate proceedings and his sister succeeded the 1<sup>st</sup> defendant's estate and she informed him about the sale to the 4<sup>th</sup> and 5<sup>th</sup> defendants and that when the 5<sup>th</sup> defendant bought his portion, it was vacant.



24. He further stated South Sakwa Barkowino 4352 emanated from South Sakwa/Barkowino 503, probate proceedings were done on Onyina's estate, and that at one time, South Sakwa Barkowino 4352 was registered in the 1<sup>st</sup> to 3<sup>rd</sup> defendants' names before eventual transfer to their sister Alice.

#### **4th defendant's case**

25. The 4<sup>th</sup> defendant testified as Dw2 and his evidence was contained in his replying affidavit, witness statement dated 17/01/2022, and, the green card for South Sakwa/Barkowino 8761 which he produced as Dex.3.
26. It was his testimony he was the registered proprietor of South Sakwa/Barkowino 8761 and the plaintiffs' claim was misplaced since it was anchored on a sale agreement. It was his testimony time had not started to run for purposes of adverse possession and a claim of fraud was improper and should be struck out.
27. It was his further testimony the plaintiffs attempted to trespass on South Sakwa/Barkowino 8761 in 2022 but he repulsed them and he was denied occupation of his property.
28. On cross-examination, it was his testimony he bought South Sakwa/Barkowino 8761 from Alice and the land was vacant when he purchased it. However, he changed his evidence and stated he found a house on it but he was not the one who pulled it down.
29. Moreover, it was his testimony the suit property was currently vacant and his prayer for eviction was misplaced. He further testified the plaintiffs together with their witness were strangers to him.

#### **5th defendant's Evidence**

30. The 5<sup>th</sup> defendant testified as Dw3 and his evidence was contained in his replying affidavit, and documents he produced to substantiate his case which were the green cards for South Sakwa/Barkowino 8762 and 4352, and a photograph. They were respectively produced as Dex.4, 5 and 6.
31. It was his evidence he purchased his land from Oliver Otieno Arika (Oliver) and thus was a bonafide purchaser for value and that his property emanated from the subdivision of South Sakwa/Barkowino/4352.
32. Furthermore, it was his evidence that he acquired the land with vacant possession with no house existing on it and he thereafter erected a shed in which he kept oxen.
33. He testified that his land was charged by the interested party and he had a peaceful occupation. On cross-examination, he testified the photographs contained in Pex.7 were of structures existing on an adjacent property.
34. Upon closing parties' cases, this court directed counsels to canvas it by written submissions, except M/s. Ooro & Co. Advocates who are the 2<sup>nd</sup> to 3<sup>rd</sup> defendants' counsel on record, all the other parties' counsels filed their written submissions.
35. The plaintiffs' counsel on record Ms. Tawo & Company Advocates filed their written submissions dated 11/12/2023, Ms. O.H. Bunde & Company Advocates for the 4<sup>th</sup> defendant filed written submissions dated 7/02/2024 while M/s.Lawi Ogutu & Company Advocates for the 5<sup>th</sup> defendant filed his submissions dated 12/02/2024.



## Issues for determination

36. I have considered the pleadings, adduced evidence, and written submissions. Being guided by well-cited provisions of law and judicial precedents that have been highlighted in the submissions, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim, and the issues for determination are: -
- I. Whether the plaintiffs' claim was competent against the 1<sup>st</sup> defendant.
  - II. Whether the plaintiffs proved their claim to the required standards.
  - III. Whether the 4<sup>th</sup> defendant proved his counterclaim of trespass.
  - IV. What appropriate orders should be granted including an order as to costs?

## Analysis and Determination

37. The issues which were earlier recognized as arising for determination shall be addressed herein in a sequential manner: -

### I. Whether the Plaintiffs' Claim was Competent Against the 1<sup>st</sup> Defendant.

38. From adduced evidence and death certificate that was produced before this court, it emerged the 1<sup>st</sup> defendant who was Onyina's wife and the mother of the 2<sup>nd</sup> and 3<sup>rd</sup> died on 14/10/2006 which was long before the suit was filed against her.
39. Having so died, a suit could not be maintained against her in her personal capacity but against her estate, and thus, the suit against her was a nullity from its inception. It is on that basis that the suit against her is as a result of this struck out and I place reliance on the Court of Appeal's decision of *Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another* [2009] eKLR which stated thus in its *obiter dictum*: -

“Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed.”

[See also *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] eKLR]

### II. Whether the Plaintiffs Proved their Claim to the Required Standards.

40. The plaintiffs' claim was on two limbs; adverse possession and fraud, misrepresentation or deceit.
41. In claims of adverse possession which is the 1<sup>st</sup> limb, the relevant provisions are underpinned in Sections 7, 13, and 38 of the *Limitation of Actions Act*, and from these provisions of law and settled case law, the onus is on the plaintiffs who claim adverse possession to prove its elements. See *Samuel Kibamba v Mary Mbaisi* [2015] eKLR.
42. The Court of Appeal decision of *Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & Another* [2015] eKLR defined the principles of adverse possession in the following terms: -

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,



lastly, he must have been 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.”

43. When a claimant claims adverse possession, this court has to apply a strict interpretation of the law on adverse possession and also bear in mind that claims of adverse possession are matters of facts that are observed on the land. Further, in deciding such a claim, the claimant has to meet not one but all the elements of adverse possession.
44. As it is a settled principle that a claim for adverse possession can only be maintained against a registered owner or owners of a particular property, it was incumbent upon the plaintiffs to tender documents to substantiate the existence of this property or properties either using an official search certificate, the green cards or an extract of the title.
45. From the amended OS, the plaintiffs’ claim was on Sakwa/Barkowino 4352 (currently registered as Sakwa Barkowino/8761 and 8762) yet they led and produced evidence on entirely different parcels of land which were South Sakwa/Barkowino 4352, 8761 and 8762.
46. As outlined by Section 6 of the [Land Registration Act](#), parcels of land have unique identifiers, and Section 6(2) thereof states: -

“Every registration unit shall be divided into registration sections, which shall be identified by distinctive names, and may be further divided into blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters.”
47. Since land is immovable property, the specific description of the suit property is required in all civil suits as outlined in Order 4 Rule 3 of the [Civil Procedure Rules](#) in the following terms: -

“Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it.”
48. Moreover, I do not know if these distinct properties were misdescribed by the plaintiffs or not but the onus was upon them to amend their pleadings before judgment, and having not been so amended, they were bound by their pleadings.
49. From the evidence, none of the defendants are the registered proprietors of Sakwa/Barkowino 4352, 8761, and 8762, and on that basis alone, the plaintiffs’ claim of adverse possession fails. See [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR.
50. Nonetheless, even if for the benefit of doubt the plaintiffs’ pleadings would have been on South Sakwa/Barkowino 8761 and 8762 which for clarity they are not, I would have found they had not met the threshold of adverse possession. On this, I would have resounded with the Court of Appeal decision [Public Trustee v Wanduru Ndegwa](#) [1984] eKLR, where Kneller JA explained as follows as to the relationship between a vendor and purchaser in the following terms: -Madan JA stated thus: -

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser *cestui qui* trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this *prima facie* entitles him to resume possession from the purchaser in possession.”



The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees*, [1957] I Ch 475; and Simpson J (as he then was) in *Hosea v Njiru Ors*, [1974] EA 526 (K).”

51. Moreover, this court would have found Onguru purchased South Sakwa/Barkowino 8761 and 8762 which are subdivisions of the mother parcel from Onyina, it would have found that the balance of the purchase price of Kshs. 1400/- was only paid on 30/08/2010 which was by an addendum agreement that reviewed the balance of the purchase price to Kshs. 70,000/-.
52. Consequently, this court would have found that time for purposes of computing the claim would have started to run from 30/08/2010, and considering 12 years for purposes of adverse possession, it would have found the plaintiffs’ claim which was filed on 3/03/2021 was premature since the earliest time they could lodge their claim would have been 30/08/2022. Thus, it would have dismissed their case.
53. On the last limb of fraud, as stated earlier in this judgment the properties claimed in the suit were at variance with the adduced evidence and I find this claim fails.
54. Nevertheless, I must mention that even if the plaintiffs had pleaded the subject properties were South Sakwa/Barkowino 8761 and 8762, I would have found that their claim of fraud had not been strictly pleaded and proved to the required standards. Further, I would have found their claim of fraud was non-suited in the circumstances of this case.

### III. Whether the 4<sup>th</sup> Defendant Proved his Counterclaim of Trespass.

55. Article 40 of the *Constitution* recognizes every person has the right to acquire and own property of any description and in any part of Kenya. Protections and limitations to such rights over land are protected by Sections 24, 25, and 26 of the *Land Registration Act* which sets out land’s rights, privileges, appurtenances, liabilities, and interests.
56. Section 3 (1) of the *Trespass Act* defines trespass as: -

“any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”
57. The case of *John K Koech v Peter Chepkwony* [2019] eKLR cited with approval *Clerk & Lindsell on Torts* 18th Edition at paragraph 18-01 which defined trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another”...Trespass is actionable at the instance of the person in possession and that proof of ownership is *prima facie* proof of possession.”
58. The 4<sup>th</sup> defendant produced the green card of South Sakwa/Barkowino 8761 which confirmed he was its registered owner. His evidence was contradictory and untruthful whereby he stated he repulsed the plaintiffs when they attempted to enter his land. He further testified the plaintiffs had not trespassed on his property and his claim was misplaced.
59. Yet at the same time, he testified the plaintiffs had trespassed on his property and had denied him usage and quiet possession. Consequently, I find the 4<sup>th</sup> defendant’s evidence full of half-truths and unreliable and find that his claim fails.



#### **IV. What Appropriate Orders should be Granted Including an Order as to Costs**

60. Ultimately, for the reasons and findings stated above, it is my ultimate finding the plaintiffs did not prove their claims to the required standards. I also find the 4<sup>th</sup> defendant did not prove his counterclaim of trespass.
61. It is trite law costs follow the event and in the absence of special circumstances, the plaintiff and 4<sup>th</sup> defendant shall bear their respective costs of this suit and counterclaim whilst the plaintiffs shall bear the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants' costs. Since the interested party did not participate in the proceedings, it shall not be awarded costs. In the end, I make the following final disposal orders;
- a. The plaintiffs' suit against the 1<sup>st</sup> defendant is hereby struck out with no orders as to costs.
  - b. The plaintiffs' suit against the 2<sup>nd</sup> to 5<sup>th</sup> defendants is hereby dismissed.
  - c. The 4<sup>th</sup> defendant's counterclaim is hereby dismissed.
  - d. The plaintiff and 4<sup>th</sup> defendant shall bear their respective costs of the suit and counterclaim.
  - e. The plaintiffs shall bear the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants' costs of the suit.
  - f. The interested party is not awarded costs.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

In the Presence of:

Mr. Tawo for the Plaintiff.

N/A for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

N/A for the 4<sup>th</sup> Defendant.

Mr. Lawi Ogutu for the 5<sup>th</sup> Defendant.

N/A for Interested Party.

Court Assistant: Ishmael Orwa.

