



Owidi (Suing as the personal administrator and representative of the Estate of Thadayo Mumbo Owidi - Deceased) v Ondenge (Environment & Land Case E005 of 2023) [2024] KEELC 4238 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E005 OF 2023
GMA ONGONDO, J
MAY 14, 2024**

BETWEEN

PILISTER MUMBO OWIDI (SUING AS THE PERSONAL ADMINISTRATOR AND REPRESENTATIVE OF THE ESTATE OF THADAYO MUMBO OWIDI - DECEASED) APPLICANT

AND

DANIEL ODHIAMBO ONDENGE RESPONDENT

JUDGMENT

A. Introduction

1. The property in the instant dispute revolves around the whole of land title number Kabondo/Kodhoch West/351 measuring approximately Zero Decimal Nine Hectares (0.9 Ha) in area (The suit land herein) and contained in Registry Map Sheet number 14. The same is located within Homa Bay County.
2. The plaintiff is represented by Ben Oduol Nyanga & Company Advocates.
3. The defendant is represented by Ochich TLO & Associates Advocates.
4. On 17th October 2023, the court made directions pursuant to Order 37 Rule 19 of the *Civil Procedure Rules* 2010 that the originating summons dated 27th February 2023 and the replying affidavit sworn on 17th March 2023 be treated as the plaint and the statement of defence respectively herein. That the suit be heard by way of viva voce evidence.

B. Summary of the Parties' Respective Cases

5. By the originating summons, the Applicant/plaintiff sued the Respondent/defendant claiming that she is entitled to the suit land by way of adverse possession. So, she seeking six orders which include;



an order that she has been in adverse possession of the whole of the suit land for a period of over 12 years and an order that the defendant holds the same in trust for her.

6. The plaintiff's lamentation is that her husband, Thadayo Mumbo Owidi (Deceased-1) was the legal registered proprietor of the suit land on 23rd May 1974. The name 'Thadayo' of Deceased-1 was erroneously left out thereof but the correction was effected on 13th October 2004. That on the same date, the defendant transferred the suit land and registered it in his name to the amazement of the plaintiff. That the suit land was subdivided on 19th December 2013 and the plaintiff discovered the said purported transfer and registration when a surveyor acted on the pleadings and orders obtained in Oyugis Principal Magistrate's court Miscellaneous Civil Application number 24 of 2022 (PE Exhibits 4 and 9 respectively) to establish boundaries of the land. That the defendant misled the said court to grant the orders and he is out to disinherit the plaintiff and the family of Deceased-1 from the suit land which she has continuously and peacefully occupied for over twelve years.
7. In his testimony, the plaintiff (PW1) relied on, inter alia, the Originating Summons, her Supporting affidavit of even date and copies of documents namely green card, title deed, death certificate, pleadings, affidavit of service and hearing notice marked as "PMO-1, 2, 3, 4, 5 and 6" annexed to the said affidavit (PE Exhibits 1, 2, 3, 4, 5 and 6 respectively). Also, she relied upon her supplementary list of documents dated 30th March 2023 namely a grant of letters of Administration Ad Litem in respect of the Estate of Deceased-1 (PE Exhibit 7) and her further list of documents dated 16th October 2023 serial numbers 1 and 2 namely sale agreement and a certificate of official search-PE Exhibits 8 and 9 respectively. She stated that she has lived on the suit land for over 50 years. That she got married to Deceased-1 whose remains were interred in the suit land.
8. PW2, John Aseko Owidi based his testimony on his statement dated 16th October 2023 as part of his testimony. He told the court that Deceased-1 was his brother. During cross examination, he stated that PW1 resides on the suit land which is interior than land reference numbers Kabondo/Kodhoch West/945 and 946 located in the same area. That Deceased-1 was buried in the suit land as per the photographs-DE Exhibit 5.
9. PW3, James Juma Ouko relied on his statement dated 16th October 2023 as part of his testimony. Under cross examination, he stated that PW1 is his neighbor and that she (PW1) stays on the suit land.
10. The defendant's case is contained in his Replying affidavit of seventeen paragraphs sworn on 17th March 2023 opposing the originating summons. He averred, inter alia, that he is the legal registered proprietor of the suit land as captured in its title deed (DE Exhibit 3). That he has possessed the same since 4th January 2007 further to sale (DE Exhibit 4) upon direct transfer from deceased-1.
11. Moreover, the defendant (DW2) stated that he owns LR No. Kabondo/Kodhoch West/352 which neighbours LR No. Kabondo/Kodhoch West/353. That the latter mutated to LR Nos. Kabondo/Kodhoch/945 and 946. That he is in possession of the suit land and that deceased-1 is not legally registered as its proprietor. That therefore, the suit should be dismissed with costs.
12. DW1, James Mingocho, a retired chief pegged his evidence on his statement dated 3rd November 2023. He told the court that the suit land belongs to Falentinus Olweny Obungu (Deceased-2) and that deceased-1 owns LR No. Kabondo/Kodhoch West/945. That he wrote DE Exhibit 1 which shows that deceased-2 as the owner of the suit land.
13. The evidence of DW2 is premised upon his replying affidavit alongside DE Exhibits 1 to 11 inclusive of copies of title deed, (DE Exhibit 3), sale agreement (DE Exhibit 4), photographs (DE Exhibit 5) and surveyor's report (DE Exhibit 9). He stated that PW1 is his neighbor. That he bought the suit land as disclosed in DE Exhibit 3 from Deceased-2 as per the agreement dated 30th April 2007 (DE Exhibit 4)



that Deceased-1 owned a neighbouring parcel of land No. Kabondo/Kodhoch West/946 which PW1 occupies and Deceased-1 was buried therein as captured in DExhibits 5 and 6.

14. By the submissions dated 12th March 2024, learned counsel for the plaintiff referred to the originating summons and delineated the issues for determination which include; whether the plaintiff is in occupation of the suit land and whether she is entitled to the orders sought in the originating summons. Counsel discussed the issues in the affirmative and referred to DExhibits 5 and 6. That the defendant is keen in trying to deceive the court that the plaintiff is not in occupation of the suit land. That land title number Kabondo/Kodhoch/946 is a subdivision of Land reference number Kabondo/Kodhoch/353. That PExhibit 9 shows that a 3rd party, Nancy Adhiambo Yogo owns the said subdivision. That the defendant claims ownership of land reference number Kabondo/Kodhoch/354 which neighbours the suit land.
15. Also, counsel submitted that the surveyor's report (DExhibit 8) is sketchy as the plaintiff neither attended the exercise that gave forth to it nor was given notice thereof. That the plaintiff is the registered proprietor of the suit land as per PExhibit 1 and in exclusive possession of the same which she uses and developed. To buttress the submissions, counsel relied on sections 7, 13, 16, 17 and 38 of the *Limitation of Actions Act* (Cap 22) and section 28 (h) of the *Land Registration Act*, 2016 (2012) as well as *Kasuve v Mwaani Investments Ltd & 4 others* (2004) 1 KLR 184 and *Wanyoike v Kahiri* (1979) KLR. That thus, the plaintiff has proved "ne vi, nec clam, nec precario (peaceful, open and continuous) possession of the suit land without the permission of its owner and implored the court to grant the orders sought in the originating summons.
16. In the submissions dated 15th March 2024, learned counsel for the defendant referred to the originating summons, the replying affidavit and the bundle of documents of even date and the testimonies of DW1, DW2. Counsel urged the court to dismiss the suit being guided by *Galaxy Paints Company Ltd v Falcon Guards Ltd* (2000) eKLR, *Richard Wafwafwa Songoi v Ben Munyikwa Songoi* (2020), *Susan Mbeke Kasome & 872 others v Njiru Development Ltd* (2021) and *Wilson Kazungu Katana & others v Salim Abdalla Bakshwein & another* (2015) eKLR.
17. Further, counsel submitted that the plaintiff contradicted herself as regards the location of her homestead. That under cross examination, PW3 disowned his testimony. That the plaintiff failed to lead evidence to prove his or her claim as envisaged under sections 7 and 13 of the *Limitation of Actions Act* (Cap 22) and section 107 of the *Evidence Act* Chapter 80 Laws of Kenya.

C. The Issues For Determination.

18. Order 15 of the *Civil Procedure Rules*, 2010 is quite instructive and it provides for;
 - a. Framing of issues and
 - b. Materials from which issues may be framed.
19. Furthermore, it is settled law that issues in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints case* (supra) and *Great Lakes Transport Company (U) Ltd v Kenya Revenue Authority* (2009) KLR 720.
20. On that account, the issues for determination herein are compressed to whether the plaintiff has established her claim against the defendant as observed in *Kasuve*, *Songoi* and *Katana* cases (supra) as regards adverse possession dictates namely;
 - a. The property in dispute 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.

D. Discussion and Disposal.

21. Additionally, it is borne in mind that adverse possession dictates that the applicant's possession and occupation of the suit land must be without permission of the owner; see Songoi case (supra).
22. Registration of the suit land is in the name of the defendant with effect from 13th October 2004 and title deed was issued on 4th January 2007 as per PExhibits 1 and 2. This is further revealed in DExhibit 3.
23. The suit land is registered in the name of the defendant under the repealed Registered Land Act Chapter 300 Laws of Kenya; see also Wainaina v Murai & others 91976-80) 1 KLR 283 at 289/290.
24. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others (2017) eKLR and Elijah. O.L Opar v Tobias Odhiambo Abach (2019) eKLR.
25. Moreover, adverse possession claim must be over the whole land in dispute or definite, distinct and ascertained portions thereof; see Kasuve case (supra) and Godfrey Shimonya Peter & 3 others v Mary Anyango Ameka and another (2018) eKLR..
26. In the instant case, the plaintiff's claim is for the whole of the suit land. The approximate area of the same is as stated in paragraph 1 hereinabove.
27. During cross examination, PW1 told the court that the photos (DOO7) annexed to the defendant's replying affidavit (DExhibit 5) show her houses erected on the suit land. She maintained that;

“.....They show my houses on the suit land. The houses in the 1st and 2nd photographs annexed to the defendant's replying affidavit are mine. The 4th and 5th photographs show my houses. The houses and the land in the photographs are mine.....my trees appear in the photographs.”

“.....my house...trees.”
28. Under further cross examination, PW1 succinctly stated thus;

“.....The gravesite of my husband appears in the this photograph (PW1 points at site in 1st photographs annexed to the defendant's replying affidavit)the surveyor did measure the land where I reside. It is the land in dispute herein. My land is LR No. Kabondo/ Kodhoch West/351.”
29. During cross examination, PW2 confirmed that PW1 resides on the suit land. That Deceased-1 was buried in the suit land as shown in DOO7 annexed to the replying affidavit (DExhibit 5). In cross examination, DW2 stated, inter alia, that the report (DExhibit 8) is not affirmed by any witness.
30. Pertaining to his homestead, DW2 stated as follows;

“.....DExhibit 10 shows my homestead on LR No. Kabondo/Kodhoch West/397 and I live thereon.....”



31. DW2 told the court that Deceased-1 transferred the suit land to him. In further cross examination, he stated;

“.....DEXhibit 3 reveals that the suit land was transferred on 13th October 2004 to me. I have no transfer document herein. I have no land control board consent annexed to my replying affidavit or list of documents.....the agreements were two and only annexed DExhibit 4 to my replying affidavit and documents.....”
32. It has emerged that, DW2 was negligent in the alleged sale. He cannot even be termed as a bonafide for value in respect of the suit land as I subscribe to the Court of Appeal decision in the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General and 4 others* (2017) eKLR.
33. In examination in chief, DW2 stated that upon search, it was disclosed that the suit land is registered in the name of Deceased-1. P Exhibits 1 and 2 show that the suit land was so registered with effect from 23rd May 1974. It puzzles the court that DW2 allegedly bought the suit land of Deceased -1 from Deceased-2 as per D Exhibit 4.
34. Clearly, DW2 did not permit PW1 to possess the suit land. ; see Songoi case (supra)
35. In the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* (2017) KLR, the doctrine of adverse possession was expounded; Nec Vi, nec clam, nec plecario (without force, without secrecy, without permission/not by force, nor stealth, nor the licence of the owner).
36. Moreover, there can be no dispossession of owner of land if enjoyment and use by that owner are possible; see *Halsbury's Laws of England* 3rd Edition Volume 24 paragraphs 481 and 484 at pages 251 and 252,
37. PW1 has established that she is in possession of the suit land as confirmed by PW2 and reinforced by DExhibit 5. That the defendant lives on LR No. Kabondo/Kodhoch West/397 as per DExhibit 10 thus, he is not in enjoyment and use of the suit land. So, DW2 has been dispossessed thereby.
38. Sections 25 (1) (b) and 28 of the *Land Registration Act*, 2016 (2012) as well as section 7 of the Land Act, 2016(2012) provide for overriding interests inclusive of adverse possession and trust sought in this suit. The principles of equity including trusts are recognized under Article 10 (2) (b) of the *Constitution* of Kenya 2010.
39. The rights of a person in possession or occupation of land are equitable rights which are binding on the land and is subject to those rights as I subscribe to the Court of Appeal decision in the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) KLR. Equitable doctrines of implied, constructive and resulting trusts arise in favour of PW1 by virtue of Article 10(2)(b)(supra) in this suit.
40. It is settled law that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see *Kirugi and another v Kabiya and 3 others* (1983) eKLR.
41. Evidently, the plaintiff has been in exclusive possession and occupation of the suit land registered in the name of the defendant as revealed in P Exhibits 1 and 2 alongside D Exhibit 3 for period in excess of twelve years and constructive trust is applicable in her favour. The defendant has been dispossessed thereby as affirmed by D Exhibit 5. The plaintiff has proved her claim against the defendant on a balance of probabilities hence, entitled to the orders sought on the face of the originating summons.
42. Wherefore, judgment be and is hereby entered for the plaintiff against the defendant in consonant with the orders sought on the face of the originating summons namely;



- a. An order that the plaintiff has been in adverse possession of the whole of the suit land, Kabondo/ Kodhoch West/351 for a period of over 12 years
- b. An order that upon the expiry of 12 years since the plaintiff was in possession of Kabondo/ Kodhoch West/ 351, the defendant's rights over the land got extinguished by the operation of law.
- c. An order that the defendant holds the suit land in trust for the plaintiff.
- d. An order that the defendant executes all transfer instruments in favour of the plaintiff and in the event of default, the Deputy Registrar of this Honourable court to execute the same to cause the plaintiff to be registered as the proprietor of the suit land.
- e. An order that the defendant do meet the costs of this suit.

43. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 14TH DAY OF MAY 2024

G. M. A ONG'ONDO

JUDGE

Present;

- a. Miss N Ochieng learned counsel for the plaintiff.
- b. Mr Ochich learned counsel for the defendant.
- c. Mutiva and Obunga, court assistants.

