



**Ongaga v Nyakundi & 4 others (Environment & Land Case
141 of 1994) [2024] KEELC 5789 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 141 OF 1994**

M SILA, J

JULY 29, 2024

BETWEEN

TERESA MORAA ONGAGA PLAINTIFF

AND

PHILIP OUKO NYAKUNDI 1ST DEFENDANT

JANE KERUBO OGORI 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, KISII 3RD DEFENDANT

BARCLAYS BANK OF KENYA LIMITED 4TH DEFENDANT

HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The suit herein was commenced through a plaint filed on 8 March 1994. The original plaint had 4 plaintiffs and four defendants. The four original plaintiffs were respectively Teresia Moraa Ongaga, Josephat Nyangweso Mosioma, Samwel Magoma Abere, and Samwel Mandere Ogeto. The original defendants were respectively Philp Ouko Nyakundi, Jane Kerubo Ogori, The District Land Registrar, Kisii, and Barclays Bank of Kenya Limited. The 2nd plaintiff, Josphat Nyangweso Mosioma, died sometimes in 2002 and he was never substituted. His case abated. The 4th plaintiff withdrew his claim. The only remaining plaintiffs are therefore the 1st and 3rd plaintiffs. On the part of the defendants, the suit against the 4th defendant (Barclays Bank) was withdrawn. The 1st defendant (Philip Ouko Nyakundi) died without any substitution being made and the suit against him abated. There was subsequently filed an amended plaint which added the Attorney General as the 5th defendant. The only defendants remaining in the suit are therefore Jane Kerubo Ogori (as 2nd defendant), the Land Registrar, Kisii, and the Attorney General (3rd and 5th defendants).



2. In the amended plaint it is pleaded that during adjudication in 1971, the 1st defendant got registered as proprietor of the land parcel Central Kitutu/Mwabundusi/594 (hereinafter sometimes simply referred to as parcel No.594). It is averred that the 1st defendant was brother to Francis Omonywa Nyakundi and Obiye Nyakundi (both deceased) who got registered as proprietors of the land parcel Central Kitutu/Mwabundusi/595 (parcel No. 595) with the two parcels abutting each other. It is pleaded that there was an error during mapping so that about 0.1 hectares went to the parcel No. 594 instead of the parcel No. 595. Through an agreement dated 1 August 1968, the 1st plaintiff pleads to have purchased from the late Francis Omonywa some land measuring 25 x 100 feet which was to be excised from the parcel No. 595 at a consideration of Kshs. 900/= . The 3rd plaintiff through a sale agreement dated 19 April 1982 purchased from Maria Bitutu Obiye, Francis Mondi Obiye, Nyamari Nyakundi, Samuel Nyakundi and Omwenga Nyakundi, land measuring 25 x 100 feet from the parcel No. 595 for Kshs. 13,000/= . It is averred that the plaintiffs have developed these plots and have been on the land for more than five to twenty years. It is pleaded that the 1st defendant wrongfully sold to George Ogori about 0.08 Ha out of this portion of 0.1 Ha and the parcel No. 594 was subdivided and the portion sold to George Ogori became registered as Central Kitutu/Mwabundusi/696. Through transmission the parcel was transferred to Jane Ogori, the 2nd defendant.
3. The 1st and 3rd plaintiffs seek the following orders :
 - i. A declaration that the plaintiffs have acquired title for their marked portions in the land parcel Central Kitutu/Mwabundusi/696 and part of parcel No. 789 by adverse possession.
 - ii. A declaration that the 3rd plaintiff is the lawful owner of his respective portion having purchased it lawfully.
 - iii. That the Honourable Court do enforce the consent orders of Justice V.V Patel made on 6 July 1989 in Civil Suit No. 126 of 1989.
 - iv. That the defendants be directed to sign the necessary documents to effect transfer for separate portions from land parcel Central Kitutu/Mwabundusi/696 and No. 789 in favour of the plaintiffs and in default the executive officer of this court be authorized to sign them on behalf.
 - v. General damages.
 - vi. Costs of the suit.
 - vii. Any other relief this court may deem fit to grant.
4. The 2nd defendant filed a joint defence with the 1st defendant and subsequently amended the defence to lodge a counterclaim. She pleaded to be a stranger to the claims of the plaintiffs and put them to strict proof. In her counterclaim the 2nd defendant asserted to be the owner of the land parcel No. 696. She asked for orders of eviction and injunction to restrain the plaintiffs from her parcel No. 696 together with costs and interest.
5. Defences to counterclaim were filed more or less joining issue with the plaintiffs asserting that they purchased their portions for valuable consideration and have been on the land for over 20 years. It will be recalled that the 2nd plaintiff died and the 4th plaintiff withdrew his suit. The withdrawal of the 4th plaintiff's suit was through a notice dated 5 September 2008 filed on 26 September 2008. There was nothing filed by the 2nd defendant withdrawing the counterclaim against the 4th plaintiff. Nevertheless, before reading this judgment, I inquired from Mr. Anyona, learned counsel for the 2nd defendant whether the 2nd defendant still maintained the counterclaim against the 4th plaintiff. His response was that the 2nd defendant was not pursuing the counterclaim against the 4th plaintiff. In light of that information, I marked as withdrawn the counterclaim of the 2nd defendant against the



4th plaintiff with no orders as to costs. The main protagonists in this case are therefore the 1st and 3rd plaintiff against the 2nd defendant with the Attorney General playing a peripheral role.

6. PW-1 was the 1st plaintiff, Teresa Moraa Ongaga, who testified before my predecessor Onyango J. She testified that she used to work for Kisii Institute of Technology and is now retired. She testified that prior to retirement she purchased a plot on 1 August 1968 from Francis Omonywa Nyakundi which plot measures 25 x 100 feet. She stated that she constructed her residence and some rental houses and has never been chased away from it. She claimed that the 2nd defendant's husband wrongfully obtained title to her portion which title is now with the 2nd defendant. She produced the sale agreement, rent receipts, a clearance certificate, copy of title, official search, and mutation form. She mentioned that she would also rely on a witness statement but I have not seen any in the file. Cross-examined she stated that the sale was done before title was obtained i.e prior to the adjudication process. She was not aware that she could be registered as proprietor of what she had bought (in process of adjudication). She stated that during adjudication the plot got registered in the name of the 1st defendant who transferred to the 2nd defendant. She was to get title to the portion she purchased but the vendor died before this could be done.
7. PW -2 was Samwel Magoma Aberu, the 3rd plaintiff. He also testified before my predecessor. He testified that he used to work at the Lands Office but is now retired. He stated that he purchased his plot measuring 25 x 100 feet in April 1986 from one Maria Bitutu from the land parcel No. 595. He followed up with the lands office and discovered that the vendor had a boundary dispute with the plot No. 594. He filed suit being Kisii HCCC No. 126 of 1989 and obtained judgment in his favour. He produced the proceedings and a consent entered in that case before Justice V.V Patel, which settled the case. He stated that the plot No. 594 was superimposed on the plot No. 595. Where he has been staying is registered as plot No. 595. He stated that he has lived there since 1982 (without giving a specific date). He testified that George Ogori used to work at the Lands Office and he purchased land out of the parcel No. 594 from the 1st defendant. What he bought came to be registered as parcel No. 696 after subdivision. He wanted this parcel No. 696 transferred to him since he occupies it on the ground. He stated that there was a mapping problem in respect of the numbers. Cross-examined, he stated that he does not have the sale agreement as he lost his documents. What he bought was Plot No. 595. He however occupies the 2nd defendant's land which emanated from subdivision of the parcel No. 594. He stated that there was a problem with the mapping which he got to know after he went to get his title. He stated that he claims a title measuring 50 x 100 feet. He reiterated that he bought land from Maria but the land was registered in name of Philip Ouko due to an error. In essence what he bought was captured in the title of Philip Ouko owing to an error during mapping. He added that Maria has her houses on the parcel No. 595. He knew George Ogori (2nd defendant's late husband) who also worked at the Lands office. He did not know that the plot was registered in name of George Ogori when he bought it in 1982. He filed a case against Philip Ouko and others but not George Ogori. He stated that he started developing the land immediately on purchase and George Ogori did not stop him
8. PW – 3 was Maria Bitutu Omono. Her evidence was that she sold to the 3rd plaintiff some land in 1982. The land had some rental semi-permanent houses. She stated that she sold the lower part and kept the upper part of it. Cross-examined, she elaborated that her husband died many years back and Francis Omonywa is her son. She was aware that the 1st plaintiff had bought a plot in 1968 from her late husband which she (1st plaintiff) still resides on and has constructed rental houses. She stated that she purchased a portion measuring 50 x 100 feet and she later added for her a small portion to build a toilet. She has no problem with the 1st plaintiff getting title. She knew the 1st defendant (Philip Ouko) as her neighbour and her husband's step brother. She could not tell the parcel number that she sold but she stated that the land was registered in the name of her husband. She sold the portion to the



- 3rd plaintiff after her husband had died. In re-examination she stated that there is a boundary dispute between her land and that of the 1st defendant.
9. With the above evidence the plaintiffs closed their case.
 10. It is at this stage that I took over the matter.
 11. DW -1 was Jane Kerubo Ogori, the 2nd defendant. She testified that her late husband, George Ogori, purchased land from Philip Ouko in 1983 and transfer to his name was effected. He thus got registered as proprietor of the parcel No. 696. He then charged the land. He subsequently died in December 1988. She stated that she paid off the loan, filed succession and the title came to be registered in her name. She stated that the land is located in Jogoo area. She lives in the vicinity but not on the disputed land. According to her, no activity takes place on the land save that there are very old structures but not in use. Cross-examined, she testified that she does not know who built those old structures on the land. She did not know whether the 3rd plaintiff lives on the land. She did not know Maria Bitutu nor Francis Omonywa Nyakundi. She reiterated that nobody lives on the land and that what is there is the old dilapidated mud structures. She was shown some photographs said to be on the land and she acknowledged that there is a mabati structure which has a tenant but she did not know who they are. She stated that she has kept off the land after the case was filed. She did not know when these structures were built. She pointed out that none of the parties sued her husband when he was alive and that the case was filed 6 years after his death. She denied that Maria Bitutu owned the land and insisted that it was owned by Philip Ouko. In re-examination she stated that the structures on the land were put up after her husband died.
 12. With that evidence the 2nd defendant closed her case.
 13. When I first retired to write the judgment I felt the need to have a survey report of the land and I had to postpone the judgment until I could see the report. The Land Registrar and District Surveyor did visit the land and filed a report. None of the parties contested it and it forms part of the record of the case. I also invited counsel to file submissions and I have taken note of the submissions filed.
 14. I will start with the ground report filed. It states that the suit land is being used by four individuals and/or their heirs, being Samwel Magoma, Samwel Ogeto Mandere, Teresia Moraa Ongaga and the family of Josphat Nyangweso. It will be recalled that Samwel Ogeto Mandere is the 4th plaintiff who withdrew his claim, whereas Josphat Nyangweso is the deceased 2nd plaintiff. Samwel Magoma and Teresia Moraa are the 1st and 3rd plaintiffs who still maintain this suit. The report states that the 1st plaintiff has some old mud houses at the near end and a small permanent structure towards the frontage. The frontage of her portion has a mabati structure being used as a tailoring shop. In respect of the 3rd plaintiff, on the portion he claims, there are old mud houses used as rentals. The frontage of the portion he occupies has a mabati structure being used for carpentry work. Despite no longer being in the suit, it may be worth mentioning that the 4th plaintiff has 18 permanent rental rooms and pit latrines at the near end of his portion and his frontage has a shop marked 'Ford Kenya, Office.' In respect of the family of the late 2nd plaintiff the portion they lay claim to has a posho mill and a welding workshop at the front; some mabati structures used by tenants; and the remainder is an open space at the rear. The report advises that the users have encroached into a portion measuring 0.02 Ha of the land parcel No. 1091 registered in name of Philip Ouko Nyakundi (the deceased 1st defendant).
 15. In the context of this case, I cannot make any orders for or against the 2nd plaintiff for the 2nd plaintiff died without substitution being done. The suit for and against the 4th plaintiff was withdrawn. It is also a good place to state that from the extract of title that I have seen in the file, I observe that the suit land i.e parcel No. 696, was created on 12 December 1984 with George Ogori as first registered proprietor. There is another register on record for the parcel No. 644 which shows that this parcel No.



644 was subdivided on 7 December 1984 to bring forth the parcels No. 695 and 696. The parcel No. 644 was first registered in name of Philip Ouko Nyakundi on 17 October 1982. On 18 November 1982 he became proprietor in common together with George Ogori with the latter owning an undivided share measuring 1/23 of the land. It is worth mentioning that the register to this parcel No. 644 shows that it emanated from a subdivision of the parcel No. 621. My perusal of the exhibits and even the record does not give me any title, search, or register in respect of the parcel No. 594 said to have been registered in the name of Philip Ouko Nyakundi. I cannot therefore vouch that the suit land actually emanated from the parcel No. 594. The records start from the parcel No. 644 which emanated from a subdivision of parcel No. 621. The parcel No. 644 was owned by Philip Nyakundi and later jointly with George Ogori. It was then subdivided into two, i.e parcels No. 695 and 696 with the later being registered in name of George Ogori on 12 December 1984. The title was charged to Barclays Bank on 14 March 1985 but discharged on 7 October 1991. The title was transferred to the 2nd defendant on 27 May 1993.

16. It will be recalled that the pleadings of the plaintiffs is that there was an error in mapping the original land parcels No. 594 said to have been owned by Philip Ouko Nyakundi and the parcel No. 595 said to have been owned by his half-brother. I have no record before me of the parcel No. 594. I cannot therefore vouch that the suit land came from the land parcel No. 594. I also do not have any map showing these two parcels No. 594 and 595 and I cannot vouch that they abut each other. Neither do I have any record of any boundary dispute having been lodged in respect of these said parcels No. 594 and 595. The only record that I have for these two parcels is a copy of title in respect of the parcel No. 595 which is registered in four names, i.e Omonywa Nyakundi, Barnaba Obiye, Nyamari Nyakundi, Samuel Nyakundi, and Omwenga Nyakundi, which title was issued on 4 March 1969.
17. The other aspect about the case of the plaintiffs is that they purchased what they occupy. The 1st plaintiff claimed to have purchased her portion on 1 August 1968 whereas the 3rd plaintiff alleged to have purchased his portion on 19 April 1982. None of them produced any sale agreement so that the particulars of what was sold can be verified.
18. What is not disputed is that the 1st and 3rd plaintiffs are in occupation and indeed that is why there is the counterclaim for their eviction. The case of the plaintiffs is hinged on the basis of adverse possession and purchase. I will analyse each of the plaintiffs' cases individually and I will start with the case of the 3rd plaintiff.

3rd plaintiff's case

19. At the outset, the case of the 3rd plaintiff cannot succeed as a claim for adverse possession. Although I saw no sale agreement, his pleadings and evidence are that he purchased the portion he occupies on 19 April 1982. He claims to have purchased land measuring 25 x 100 feet which he believed to be from the parcel No. 595. It is trite that to succeed in a case for adverse possession, one needs to prove quiet and open possession of the land claimed, for a continuous uninterrupted period of 12 years. If the 3rd plaintiff bought his land on 19 April 1982 and took possession thereafter then his claim would only ripen after 12 years which would be 19 April 1994. This suit was filed on 8 March 1994 before the lapse of 12 years. It is about a month or so short of clocking the 12 year period and that does not help him at all. It follows therefore that the 3rd plaintiff cannot succeed under adverse possession.
20. The other cause of action of the 3rd plaintiff appears hinged on purchase and an order made by consent on 6 July 1989 in the case Kisii HCCC No. 126 of 1989. On purchase, his claim clearly cannot succeed. One can only succeed in a claim for purchase in a suit against the vendor where the claimant asserts the right of specific performance. However, neither the 2nd defendant nor her late husband sold any land to the 3rd plaintiff. He cannot therefore succeed on the claim of purchase. In



any event, no sale agreement was produced, no consent of the Land Control Board, and no instrument of transfer. What about the order by consent made in Kisii HCCC No. 126 of 1989? The plaint was not forwarded and I cannot quite tell what it was that was claimed. But I can see from the consent that the 3rd plaintiff had sued Samuel Nyakundi, Nyamari Nyakundi, Omwenga Nyakundi, Francis Moindi Obiye, and Maria Bitutu. It will be recalled that these were the proprietors of the land parcel No. 595. A consent was recorded whereby the defendants admitted the plaintiff's claim and they agreed that they will transfer to the plaintiff a portion of land measuring 25 X 100 feet 'to be subdivided from Central Kitutu/Mwabundusi/595 and if this parcel has been closed, then from parcels Central Kitutu/Mwabundusi/758 and 762 the new number. That the said portion of land should be the portion on the ground where the plaintiff has developed and put up permanent houses.' The 3rd plaintiff in this case asks that this be enforced. Well, putting aside the legal position that you need to enforce an order from the file in which it emanated, the consent is not against the 2nd defendant herein. Neither is there mention in that consent of the land parcel No. 696. Whatever the case such consent cannot be enforced against the 2nd defendant for not being party to it. You cannot agree with a defendant by consent to affect the land of a third party who is not party to the consent. But even if we say that we will enforce the consent, it is a consent against the title numbers, 595, 758 and 762. There has never been any holding in any quarter that the suit land, i.e parcel No. 696 forms part of any of the three mentioned land parcels. If the consent is to be enforced based on ground occupation and it happens that the occupation of the 3rd plaintiff was in the parcel No. 696, as I have said, the consent cannot be enforced against the parcel No. 696 as the owner of it was not party to the consent. It thus follows that the 3rd plaintiff cannot succeed against the 2nd defendant based on the purported consent in the suit Kisi HCC No. 126 of 1989.

21. From the above, the 3rd plaintiff cannot succeed on adverse possession; he cannot succeed on purchase; and he cannot succeed based on the consent in the suit Kisii HCCC No. 126 of 1989. It is upon these three issues that his cause of action was founded and he has failed on all of them. I have no option but to dismiss his case with cost. In the same vein, I have no reason not to allow the counterclaim of the 2nd defendant against the 3rd plaintiff for eviction and for an injunction against him. I will order the 3rd plaintiff to give immediate vacant possession of the portion he occupies to the 2nd defendant and in any event no later than 30 days from the date hereof. If he fails to vacate an order of eviction to issue. After the lapse of 30 days given, the 3rd plaintiff is permanently restrained from entering, utilising, or in any other way, interfering with this portion of the suit land. The 2nd defendant also gets costs of the counterclaim.

Case of the 1st plaintiff

22. In respect of the 1st plaintiff, her case is strictly one for adverse possession. It is her pleading and evidence that she purchased the portion she occupies measuring 25 x 100 feet on 1 August 1968 from the late Francis Omonywa Nyakundi. She stated that she constructed her residence and rental units on this portion and her possession has never been affected. This evidence was supported by PW – 3 who testified that the 1st plaintiff has occupied this portion since 1968. This evidence was not shaken by the 2nd defendant. There is no evidence presented that after George Ogori purchased the suit land he made any attempt to remove the 1st plaintiff from it. Her possession was therefore open and peaceful and remained uninterrupted from 1968 till the suit was filed in 1992 which is in excess of 12 years. I am therefore prepared to hold that the 1st plaintiff has proved on a balance of probabilities that she has been in open, quiet, uninterrupted possession of the portion that she occupies as identified in the surveyor's report, for a period in excess of 12 years and she deserves to be declared owner of this portion by dint of the doctrine of adverse possession. Given that her case succeeds, I must allow her suit and dismiss the counterclaim against her with costs. I order that her portion be carved out of the suit land and be given a new title. The 2nd defendant to cooperate in the process and in default the Deputy



Registrar of this court to ensure that all requisite documents required to process title in her name are procured and registered.

23. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF JULY 2024.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the Presence of :

Mr. Sagwe for the 1st plaintiff and holding brief for Zablon Mokuia for the 3rd plaintiff

Mr. Anyona for the 2nd defendant/counterclaimant

Mr. Ndiritu, State Counsel, for the 3rd and 5th defendants

Court Assistant – David Ochieng'

