



Mbira v Atieno & another (Sued as the administrators of the Estate of Jacob Kerito Omollo-Deceased) (Environmental and Land Originating Summons 6 of 2022) [2024] KEELC 5524 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 6 OF 2022**

GMA ONGONDO, J

JULY 18, 2024

(FORMERLY MIGORI ELC CASE NO 324 OF 2017, O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL CENTRAL

KASIPUL/KAMUMA/450

AND

IN THE MATTER OF AN APPLICATION FOR A DECLARATION

THAT THE PLAINTIFF HAS OBTAINED OWNERSHIP OF LAND

PARCEL KNOWN AS CENTRAL KASIPUL / KAMUMA/450.

BETWEEN

BETWEEN

PETER OBUYA MBIRA PETITIONER

AND

KERINA ATIENO 1ST RESPONDENT

MILKA ADHIAMBO ODOYO 2ND RESPONDENT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF JACOB KERITO
OMOLLO-DECEASED**



JUDGMENT

1. By an originating summons dated 28th March 2017, the plaintiff/applicant through Kerario Marwa and Company Advocates, sued the three defendants/respondents seeking the following orders;
 - a. Declaration that the plaintiff Peter Obuya Mbira has acquired title adverse possession of all that parcel of land known as Central Kasipul/Kamuma/450 (The suit land herein).
 - b. That the plaintiff Peter Obuya Mbira be registered as proprietor in place of Jacob Kirito Omollo of all that parcel of land situated in Oyugis and described as the suit land.
 - c. That a permanent injunction be issued to restrain the defendants whether by themselves or by their servants or employees from disturbing the possession of the plaintiff or in any manner carrying out any works on the suit land.
 - d. That costs be provided for.
2. The originating summons is premised upon the plaintiff's supporting affidavit as well as the grounds infra;
 - a. That the plaintiff has occupied the said land adversely for more than 12 years.
 - b. That the defendants have never occupied the suit land since 1981 to date.
 - c. That the title of the defendants is extinguished as a matter of law.
 - d. That the defendants are holding title in trust for the plaintiff.
3. The defendants through J.O Otieno and Company Advocates, denied the plaintiff's claim by their statement of defence dated 15th May 2020 and prayed that the originating summons be struck out with costs. They stated in part that they are the administrators of the estate of Jacob Kirito Omollo (Deceased) by virtue of the certificate of confirmation of grant issued on 30th August 2017. That the plaintiff has never occupied, owned and or used the suit land which has been possessed by the family of the deceased who until his death was the registered owner.
4. Also, the defendants averred that the plaintiff did not seek to be included as a beneficiary if at all he had any claim in the estate of the late Omollo Nyakado from whom the deceased inherited and acquired the suit land by virtue of being a son. That the plaintiff who was aware of succession proceedings relating to the estate of the deceased never raised any objection hence, has no legal and or moral right to make the claim which is time barred.
5. The defendants were duly served for hearing of the suit which was fixed for 21st May 2024 as revealed in the affidavit of service sworn on 29th March 2024 by Kerario Marwa learned counsel for the plaintiff.
6. Besides, neither the defendants nor their counsel, attended court for the hearing of the suit.
7. During the hearing of the suit, the plaintiff (PW1) relied on his supporting affidavit and testified, inter alia, that he has lived on the suit land for forty years continuously and peacefully. That there has been no attempt to evict him from it. That he filed Kisii ELC OS No. 368 of 2014 against the deceased over the suit land but the suit has now abated. He relied upon PExhibits 1 to 3 which include sale agreement alongside documents inclusive of green card accompanying the plaintiff's supplementary affidavit sworn on 16th June 2017 (PExhibits 4, 5 and 6)



8. In the submissions dated 5th June 2024, learned counsel for the plaintiff gave the background of the dispute including the originating summons, the replying affidavit and stated that PW1 has been in open, peaceful and continuous occupation of the suit land for the prescribed period of time. Counsel framed three issues for determination namely whether the plaintiff has been in peaceful and continuous occupation of the suit land for more than twelve years; whether the plaintiff has proved his case on a balance of probabilities and whether he deserves the orders sought in the originating summons.
9. In discussing the said issues, counsel placed reliance on section 38 of the *Evidence Act* Chapter 80 Laws of Kenya and the evidence of PW1. Further, counsel relied on *Wambugu-v-Njuguna* 91983) KLR 172 and *Mbira-v-Gachuhi* (2002) EALR 137, among others, that PW1 has proved that his entry into the suit land was non-consensual and dispossessed the registered owner of the same thus, proved his unchallenged claim against the defendant to the requisite standards.
10. Notably, the defendants did not file submissions herein.
11. It is established law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Co. Ltd-v-Falcon Guards Ltd* (2000) 2 E A 385.
12. In the foregone, the issues for determination herein are crystallized to whether the plaintiff has established his claim over the suit land against the defendants as observed by the Court of Appeal in the case of *Wilson Kazungu Katana-v-Salim Abdalla Bakshwein and another* (2015) eKLR that adverse possession dictates that;
 - a. The suit land 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.
13. As regards the first dictate, the suit land is registered in the name of the defendants with effect from 30th January 2017 as disclosed in the certificate of official search (P Exhibit 4).
14. Concerning the second dictate, the plaintiff stated that he has been in possession and occupation of the suit land peacefully and uninterruptedly for forty years. That he has developed it and no attempt has been made to evict him therefrom.
15. It is well settled that possession can take different forms such as fencing and cultivation of the land in dispute; see *Kimani Ruchine and another-v-Swift Rutherford Company Ltd and another* (1976-80) 1 KLR 1500.
16. The evidence of PW1 was that he developed the suit land and has lived thereon together with his family since 1981. This points to the plaintiff's open and exclusive possession of the same in an adverse manner to the title of the defendants.
17. As pertains to the third dictate, since PW1 lives on the suit land, he has ousted the defendants from it followed by adverse possession, occupation and development; see also *Gatimu Kinguru-v-Muya Gatangi* (1976-80) 1 KLR 317.
18. It is trite law that the burden was always on the plaintiff to prove his or her case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof as held in *Kirugi and another-v-Kabiya and 3 others* (1987) KLR 347.



19. Clearly, the defendants' counsel was duly served with the hearing notice as stated in paragraph 4 hereinabove. However, they failed to appear in court during the hearing to advance evidence in opposition to this suit.
20. In that regard, the defendants were given fair opportunity to be heard in the suit as noted in [James Kanyiita Nderitu and another-v-Marios Philotas Gbikas and another](#) (2016) eKLR.
21. To that end, the plaintiff's claim is well founded, unchallenged and cogent. The same has been proved against the defendants on a balance of probabilities as noted in, *inter alia*, [Wambugu and Wilson Katana](#) cases (*supra*).
22. Wherefore, judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for orders 1, 2, 3 and 4 sought in the originating summons dated 28th March 2017 as stated at paragraph 1 (a) (b) (c) and (d) hereinabove.
23. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 18TH JULY 2024.

GEORGE M.A ONGONDO

JUDGE

Present

1. The plaintiff. His counsel absent
2. Luanga, court assistant

