



**Kodhul v Abichi (Sued as the Legal Administrator of Raphael Kisenge - Deceased) (Environment & Land Case 513 of 2017) [2024] KEELC 14208 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 14208 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 513 OF 2017  
GMA ONGONDO, J  
SEPTEMBER 25, 2024  
IN THE MATTER OF : A CLAIM FOR ADVERSE POSSESSION  
PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT**

**BETWEEN**

**MILTON ROBERT KODHUL ..... PLAINTIFF**

**AND**

**GEORGE OKINYI ABICHI (SUED AS THE LEGAL ADMINISTRATOR OF  
RAPHAEL KISENGE - DECEASED) ..... DEFENDANT**

**JUDGMENT**

1. The instant dispute revolves around four [4] acres being part of Land Reference number SUNA WEST/WIGA/84 [The suit land herein]. The same is located in Suna West within Migori County.
2. The plaintiff is represented by M/s Oguttu Mboya, Ochwal and Partners Advocates.
3. The defendants are represented by M/S Ochang' Ajigo and Company Advocates.
4. Originally, this suit was lodged at Kisii Environment and Land Court and with effect from 28<sup>th</sup> March 2017, it was transferred to this court for hearing and determination.
5. The Plaintiff initiated this suit by way of an originating summons dated 9<sup>th</sup> August 2012 under Order 37 Rules 7 and 14 of the Civil Procedure Rules 2010 and section 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya claiming to have acquired title over the suit land by prescription and or adverse possession for determination of the following issues;
  - a. A declaration that the defendant rights to recover the suit land is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 15 years.



- b. There be an order that the Plaintiff be registered as the proprietor of the suit land, in place of the defendant
  - c. There be an order restraining the defendant either by himself, agents, servants and/or employees from interfering with plaintiff's peaceful possession and occupation of the said portion measuring 4 Acres of the suit land, in any manner whatsoever, and/or howsoever.
  - d. Costs of this originating summons be borne by the defendant.
  - e. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstance of this case.
6. By his replying affidavit filed herein on 14<sup>th</sup> January 2013, the defendant opposed the originating summons. He averred, inter alia, that he is the lawful registered proprietor of the suit land having acquired the same through transmission vide in Migori Senior Principal Magistrate's Court Succession Cause No. 124 of 2010. That the plaintiff trespassed into the suit land in the year 2012 and started to cultivate it. Therefore, he urged the court to dismiss the suit with costs.
  7. The plaintiff [PW1] testified that in May 1995, he bought the suit land from Raphael Kisengi [deceased-1], the defendant's grandfather. That they repared and signed agreement thereof as the defendant was a school going child at the time. That there was no disturbance on the suit land until the year 2012 when he found a caution having been lodged in respect of the same. That he conducted search that showed that the suit land which had been registered in the name of PW1, was registered in the name of the defendant without his knowledge. He stated that he cultivates the suit land and relied on the originating summons, the supporting affidavit and bundle of documents dated 12<sup>th</sup> January 2016 [PEXhibits 1 to 4] namely; green, card, certificate of official search, land sale agreement dated 15<sup>th</sup> May 1995 and photographs respectively, in support of his case.
  8. In cross examination, PW1 maintained that he bought the suit land from deceased-1 in the year 1995 at Kshs 2,000/- as per the sale agreement [PEXhibit 3] which was witnessed by John Okinyi Abich [Deceased-2] who was father to the defendant. That he does not live on the suit land but cultivates it.
  9. PW2, Paul Yogo Tumbo, Chief Suna Lower Location for 25 years testified that on 12<sup>th</sup> July 2014, the defendant who is a resident of the location, raised a complaint against PW1 over the suit land. Also, that he prepared a letter that he had not prepared any letter as regards succession of the suit land-PEXhibit 5. During cross examination, he stated that he knew not the circumstances under which the suit land was sold.
  10. The defendant [DW1] relied on his replying affidavit and stated that in 2012, PW1 forcefully entered the suit land which DW1 cultivates. That it is registered in his name and had acquired it through succession In Migori Law Court Succession Cause No. 124 of 2010 without any objection. That originally, the suit land belonged to his grandfather [Deceased 1] and was not aware of the alleged sale as Deceased-2 was literate hence could not thumbprint PEXhibit 3. That the photos [PEXhibit 4] do not relate to the suit land into which PW1 trespassed into. That he then reported the issue of trespass to the area chief and the police thus, PW1 was arrested and charged in court but the case was withdrawn as he [DW1] was away in Somalia. That PW1 is only interested in the suit land for gold deposit.
  11. Under cross examination, DW1 could not confirm sale agreement [PEXhibit 3] and that PW1 never took possession of the suit land. That the photographs [PEXhibit 4] do not relate to the suit land. That he carried out succession as stated in paragraph 6 hereinabove in 2020 and obtained title to the suit land on 15<sup>th</sup> March 2012 hence, he owns it .



12. DW2, Odhiambo Daniel Abich relied on his statement dated 17<sup>th</sup> December 2021 as part of his evidence. He stated that the suit land belongs to DW1. That the same was never sold to PW1 who invaded the land in 2012 and started mining gold thereat. That photograph of the suit land [DExhibit 2] shows that PW1 does not possess the suit land. That his father [Deceased 2] was literate and could not thumbprint PExhibit 3.
13. DW3, John Onyango Wasonga, a village elder since 2008 and a neighbour to PW1 referred to his statement on record and relied upon it. He told the court that Deceased-1 did not sell it and that PW1 does not occupy the same. That PExhibit 4 do not relate to the suit land at all.
14. DW4, Fred Gilbert Otieno testified that he was the area Chief in 1995 and relied upon his statement dated 27<sup>th</sup> January 2021 as part of his evidence in chief. He stated that there was no sale of the suit land at any time. That agriculture and gold mining activities are carried out thereon. That PW1 lives 2 ½ kms away from the land and does not occupy or use the same. That it is occupied by DW1.
15. The plaintiff's counsel filed submissions dated 18<sup>th</sup> January 2024 making reference to the ingredients of adverse possession which have gained notoriety. That the validity and legality of PExhibit 3 is immaterial as the claim is for adverse possession over the suit land and placed reliance on the case of Kariuki MurunjivMagdalene Wairimu Wanjohi [2017] eKLR and Mbugua NjugunavElijah Mburu & another [2004] eKLR. That nonetheless, the plaintiff has properly acquired the suit land by way of adverse possession.
16. Also, counsel framed three issues for determination including whether PW1 entered into a lawful land sale agreement and if so, whether the occupation in respect of the suit land by PW1 became adverse upon lapse of six months from the date of the land sale agreement and whether the said occupation meets the threshold for declaration of adverse possession. It was submitted, inter alia, that by the nature of activities revealed in PExhibit 4 coupled with the fact the defendant did not take any steps to recover the suit land, adverse possession over it is attained by PW1 in the circumstances. To reinforce the submissions, counsel further cited the case of Celina Muthoni Kithinji v Safiya Binti Swaleh and another [2018] eKLR.
17. By the submissions dated 1<sup>st</sup> July 2024, learned counsel for the defendant implored the court to dismiss the suit with costs as the alleged sale of the suit land was not proved by the plaintiff. Counsel submitted in part that the suit was initiated after the death of the alleged vendor, Raphael Kisengi [Deceased 1], his wife and his son, John Abich Kisengi. That there is conflict of dates namely 20<sup>th</sup> April 1990 and 15<sup>th</sup> May 1995 regarding the alleged sale of the suit land.
18. Further, counsel submitted that the plaintiff did not show steps taken to get consent of the area Land Control Board as regards the alleged sale of the suit land and relied on photographs not taken in line with the *Evidence Act* [Cap 80 Laws of Kenya] and did not call any witness in support of the suit. To fortify the submissions, reliance was made on the case of WambuguvNjuguna [1983] KLR 172.
19. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd v Falcon Grounds Ltd* [2000] 2 EA 385 and Order 15 of the Civil Procedure Rules, 2010.
20. I have anxiously considered the originating summons, the replying affidavit, the issues for determination [the plaintiff's version] dated 1<sup>st</sup> July 2016, the parties' respective testimonies and submissions. Thus, the issues for determination are whether the plaintiff has established his claim for adverse possession over the suit land to the requisite standards and whether he is deserving of the orders outlined on the face of the originating summons.



21. It is noteworthy that adverse possession doctrine has been discussed in a long range of authorities including the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another* [2015] eKLR where the Court of Appeal held that the said doctrine dictates as follows;
  - a. The parcel of 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.
22. The plaintiffs' claim is for adverse possession is over the suit land as stated in paragraph 1 hereinabove. Therefore, the plaintiff's claim is over a definite portion of land as observed in the case of *Muthuita v Wanoe & 2 others* [2008] 1KLR [G&F] 1024.
23. On the issue of registration, PW1 stated that title to the suit land is registered in the name of DW1 who did confirm so. Pexhibits 1 and 2 as well as DExhibits 2 and 6 disclose that the suit land is registered in the name of DW1 with effect from 13<sup>th</sup> January 2012.
24. Concerning the second and third dictates, PW1 stated during cross examination as follows;
 

“.....I bought the land on 15<sup>th</sup> May 1995 and 20/04/1990....I paid full purchase price on 15<sup>th</sup> May 1995 to the deceased seller...’.....not obtain title to it....not live thereon but cultivates the same...maize and cassava for 26 years.....not attend the area land control board.....fenced it using sisal plants and blue gum trees.’
25. It is established law that possession can take different forms including fencing and cultivation of the land in question; see *Titus Ong’ang’a Nyachieo=vs= Martin Okioma Nyauma and 3-others* [2017] eKLR.
26. DW1 was emphatic that the photographs in form of PExhibit 4, do not relate to the suit land. This was corroborated by the testimonies of DW2 and DW3.
27. In cross examination, PW1 stated that he bought the suit land on 20<sup>th</sup> April 1990 and 15<sup>th</sup> May 1995. He produced PExhibit 3 in respect of the latter date but failed to produce evidence to affirm the former date.
28. PW1 testified that he did not obtain the consent of the area Land Control Board in regard to the sale of the suit land. The court is not unaware of sections 6 and 8 of the *Land Control Act* Chapter 302 of the Laws of Kenya and the Court of Appeal decision in the case of *Willy Kimutai Kitilit= vs=Michael Kibet* [2018] eKLR on the application of constructive trust in such cases in the spirit of the principles of equity under Article 10 [2] [b] of *the Constitution* of Kenya 2010.
29. Furthermore, the defendant's counsel terms the two dates conflicting as pertains to the sale of the suit land. Indeed, the court was puzzled to discern when six months lapsed for purposes of adverse possession as noted in *Kariuki Murunji and Mbugua Njuguna* cases [supra].
30. The evidence of DW1 and DW2 was that PW1 invaded the suit land in the year 2012. The testimonies of DW1, DW2, DW3 and DW4 were consistent to the effect that PW1 does not occupy the suit land.
31. In the circumstances, the evidence of the defendant thwarts that of the plaintiff. It follows that the defendant has not been dispossessed of the suit land.



32. To that end, it is the considered view of this court that the plaintiff has failed to establish the ingredients of adverse possession over the suit land to the requisite standards as noted in Katana case [supra] and Gatimu Kinguru v Muya Gathangi [1976-80] 1 KLR 317. Thus, his claim fails.
33. Wherefore, this suit generated by way of an originating summons dated 9<sup>th</sup> August 2012, be and is hereby dismissed with costs to the defendant.
34. It is so ordered.

**DATED AND DELIVERED at MIGORI this 25<sup>th</sup> day of SEPTEMBER 2024.**

**G. M. A. ONGONDO**

**JUDGE**

In Presence of ;-

Mr B. Mulisa learned counsel for the plaintiff

Mr Ochang' Ajigo learned counsel for the defendant

Tom- C/Assistant

