



Oombo & another v Onyango (Sued as the Adminstratix of the Estate of the Late John Onyango Amach - Deceased) (Environment and Land Appeal E027 of 2022) [2024] KEELC 14224 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 14224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E027 OF 2022
GMA ONGONDO, J
OCTOBER 23, 2024**

BETWEEN

RONALD ODONGO OOMBO 1ST APPELLANT

ALEX OMBENG OKELLO 2ND APPELLANT

AND

PERES ATIENO ONYANGO RESPONDENT

SUED AS THE ADMINSTRATIX OF THE ESTATE OF THE LATE JOHN ONYANGO AMACH - DECEASED

(Being an Appeal arising from the Judgment of Hon. T. Olando, Principal Magistrate dated 3rd August 2022 at Homa Bay Chief Magistrate Court in Environment and Land Case No. 54 of 2019)

JUDGMENT

1. The present appeal emanated from the judgment of the trial court delivered on 3rd August 2022 where the learned trial magistrate (Hon T. Olando, PM) reasoned that the respondent who was the plaintiff in that court, had proved her case on a balance of probabilities. Therefore, he entered judgment for her in the following terms:
 - a. An order of eviction against the defendant and/or proxies and/or his agents and/or servants from that entire parcel of land known as Kanyada/Kanyango/Kalanya/6273 situate in Rodi-Kompany within Homabay County (the suit land).
 - b. A permanent injunction restraining the defendant and/or proxies and/or his agents and/or servants from interfering with, encroaching upon and/or dealing with the suit land in any manner inconsistent with and adverse to the plaintiff's proprietary rights herein.



- c. As its trite law that costs follow event, I award costs of the suit to the plaintiff with interest thereof from the date of this judgment.
2. Dissatisfied at the said determination, the appellants through Aluoch Odera and Nyauke Advocates filed the appeal by way of a memorandum of appeal dated 4th August 2022 and amended on 3rd June 2024 based on thirteen (13) grounds which include;
 - a. The honourable subordinate court failed to take note of the period the alleged agreement between the 1st appellant's father and the respondent's husband was entered into thus failing to appreciate the import of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.
 - b. The honourable subordinate court failed to appreciate that the suit was time barred.
 - c. The honourable subordinate court failed to appreciate that the case before it had substantially been a subject of a trial between the respondent and the appellants and in which case the respondent testified as DW2 and as such the case was res judicata.
 - d. The honourable subordinate court failed to appreciate the import of Civil Procedure Act with regard to duplicity of cases.
 - e. The honourable subordinate court failed to appreciate the import of Section 38(b) of the Land Act thus arriving at a wrong decision especially considering lapse of time.
 - f. The honourable subordinate court failed to recognize that the 2nd appellant did not have any contract with the respondent and that the 2nd appellant's title was clean title arising out of adjudication process.
 - g. The honourable subordinate court failed to appreciate that the respondent could not attack 1st registration of a title without proving fraud and/or collusion between the 2nd appellant and the Land Adjudication Office.
 - h. The honourable subordinate court failed to appreciate the law in regards to the protection of the 2nd appellant's interest as an innocent purchaser for value without notice.
 - i. The honourable subordinate court wrongfully invited itself to consider issues of adverse possession that had not been pleaded and which was otherwise not proved.
3. Thus, the Appellants are seeking the following orders;
 - a. The judgment of the subordinate court be quashed and set aside and the respondent's case in the subordinate court be dismissed with costs.
 - b. The costs of this appeal and interest on the same be provided for in favour of the appellants.
4. The appellants' counsel filed a Supplementary Record of Appeal dated 28th June 2024 wherein he annexed the amended memorandum of appeal.
5. The appeal was heard by way of written submissions further to this court's directions of 29th May 2024
6. The appellant's counsel filed submissions dated 3rd June 2024 and identified five issues for determination to wit:
 - a. Whether the alleged purchase of the suit land by the respondent's husband is enforceable in law.
 - b. Whether the doctrine of res judicata is applicable in the lower court's suit.



- c. Who is the rightful owner of the suit land?
 - d. Did the lower court misapply the doctrine of adverse possession?
 - e. Who should bear the costs of these proceedings?
7. Learned counsel submitted that the purported sale agreement between the respondent's husband and the 1st appellant's father was not properly executed and attested to since some of the witnesses' signatures are missing and one of the buyer's witnesses did not indicate his National Identification Number. That therefore, the same is null and void in the circumstances. That whereas the agreement was purportedly executed on 31st July 1995, the respondent lodged the original suit at the trial court on 17th October 2019, more than twenty years later. That the suit was thus, time barred by dint of the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 8. Further, counsel submitted that the trial court's suit was res judicata. That parties had litigated over the suit land in Homa Bay Chief Magistrate's Court Environment and Land Case No. 9 of 2014, wherein the respondent testified as DW2. That the 2nd appellant is an innocent purchaser for value, who obtained good title from the 1st appellant. That the trial court erred in considering the issue of adverse possession yet the same was neither raised nor the elements thereto proven by the respondent. Thus, counsel urged the court to allow the instant appeal. Reliance was placed on the case of *Gabriel Mbuvi v Mukindia Maranya* (1993) eKLR, among others, to fortify the submissions.
 9. The respondent's counsel, Mochiemo Gichana and Company Advocates, did not file any submissions herein.
 10. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to consider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co. Ltd.* and others (1968) EA 123 and *Williamson Diamonds Ltd. v Brown* (1970) EA 1.
 11. It must be noted that at the trial court, the respondent/plaintiff sued the appellants by way of a plaint dated 17th October 2019 for the following orders;
 - a. Permanent injunction restraining the appellants jointly and severally or their agents, persons acting on their behalf from interfering with, alienating, occupying or dispossessing the respondent of the suit land.
 - b. A declaration that the first appellant has an obligation and legal duty to transfer the suit land to the respondent or the administrators of the Estate of John Onyango Omach (hereinafter referred to as deceased 1).
 - c. An order of specific performance/transfer of the suit land to the respondent or the Estate of deceased 1.
 - d. Costs of the suit plus interest at court rates.
 - e. Any other relief that this honourable court may deem fit.
 12. PW1, Peres Atieno Onyango, relied on a limited grant in respect to the estate of deceased 1, certificate of official search in respect to the suit land and sale agreement (PE Exhibits 1 to 3 respectively). She testified that she is the widow to deceased 1, who purchased the suit land from one Nicholas Oombo Opany (deceased 2) who is the father of the 1st appellant herein. That the 1st appellant has transferred the suit



- land to the 2nd appellant. That such transfer occurred after the suit land had been sold to deceased 1. On cross-examination by the appellants' counsel, she stated that she was not a witness to the agreement between deceased 1 and 2. When the court sought clarification, PW1 stated that they constructed a house on the suit land in 1997.
13. PW2 Joshua Odero Waka, testified that he was the Chief of East Kanyada Location and witnessed execution of PExhibit 3 between deceased 1 and 2. Under cross-examination, he stated that the sale was for land parcel number 858 (the original title herein), which was later subdivided into Land Parcel Numbers Kalanya/Kanyango/5485, 5486, 5487 and later subdivided into the suit land herein. That both parties were present in his office and confirmed that the purchase price had been paid.
 14. Silas Owuor Oyugi, PW3, relied on his statement dated 16th September 2020, which was adopted as part of his evidence. He testified that he is the former Senior Assistant Chief, Kalanya Kanyango Sub-location. That deceased 1 and 2 went to his office, to carry out the sale of the original title. That deceased 2 was accompanied by his son, the 1st appellant herein. That he witnessed the agreement on 23rd December 1996. That thereafter, deceased 1 constructed six houses thereon and rented out the same. That his office was housed in the premises from 1996 to 2017 and following the demise of deceased 1, he used to pay rent to the respondent herein. That the 1st appellant was also a witness to the sale agreement, PExhibit 3.
 15. During cross-examination, PW3 stated that deceased 1 purchased a portion measuring 50 by 100 feet in area, out of the original title to wit, Land Parcel Number Kalanya/ Kanyango/ 858.
 16. The suit was opposed by the 2nd appellant by way of a Statement of Defence dated 2nd December 2019, wherein he prayed that the respondent's claim be dismissed with costs.
 17. The 1st appellant (DW1) relied on his statement recorded on 24th November 2020, which was adopted as part of his evidence. He produced a copy of his National Identity Card (DExhibit 1). On cross-examination, he stated that he did not know that deceased 1 had sold the suit land. That he does not know the person who constructed the houses thereon.
 18. The 2nd appellant (DW2) relied on his statement recorded on 2nd December 2019 which was adopted as part of his evidence. He produced in evidence a copy of the title deed, official search certificate and a copy of judgment in Homa Bay Chief Magistrate's Court's Environment and Land Case No. 9 of 2014 (DExhibits 1, 2 and 3 respectively). Under cross-examination, he stated that at the time of purchase, there was a maize plantation on the suit land. That later, he found structures thereon, which he demolished.
 19. It is important to note that the learned trial magistrate stated the parties' respective cases, delineated two issues for determination, discussed them and reached his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*.
 20. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether the original suit was time barred?
 - b. Whether the original suit was res judicata.
 - c. Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
 - d. What final orders can this court make to meet the ends of justice?



21. In his judgment, the learned trial magistrate observed thus:
- “...The evidence tendered by the plaintiff was that her husband purchased the land from the defendant’s father and this evidence was not challenged... I have looked at the agreements which were produced as exhibits and I have no doubt that the agreements are authentic and represent the true position of what took place...”
22. On the first issue, the appellants contend that the trial court failed to appreciate that the suit was time barred.
23. I have examined the sale agreement (PExhibit 3) in entirety. I note that the same was executed between deceased 1 and 2 and is dated 31st July 1995.
24. Evidently, the validity of PExhibit 3 was corroborated by PW2 and PW3. However, it is clear that the respondent instituted the suit at the trial court after the lapse of 6 years, in contravention of Section 4(1)(a) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
25. On the second issue, the appellants lament that the honourable subordinate court failed to appreciate that the case before it had substantially been a subject of a trial between the respondent and the appellants and in which case the respondent testified as DW2. That as such, the case was res judicata.
26. The principle of Res Judicata is found in Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
27. In Black’s Law Dictionary 10th Edition at page 1506, the term ‘*res judicata*’ means an issue that has been definitively settled by judicial decision.
28. Additionally, the essential elements of ‘*res judicata*’ are stated thus:
- a. A decision on the issue
 - b. A final judgment on merits
 - c. The involvement of the same parties or parties in privity with the original parties.
29. I have perused the judgment of the court in Homa Bay Chief Magistrate’s Court Environment and Land Case No. 9 of 2014 (DExhibit 3) and note that the suit was instituted by the 2nd appellant herein against one Charles Ochuka Amach. The 1st appellant was an interested party in that suit which was commenced by way of a plaint dated 3rd July 2014.
30. Further, I note that the subject matter in the said suit was the suit land herein and the 2nd appellant sought the orders infra:
- a. An order of eviction against the defendant and/or proxies and/or his agents and/or servants from the suit land.



- b. A permanent injunction restraining the defendant and/or proxies and/or his agents and/or servants from interfering with, encroaching upon and/or dealing with the suit property in any manner inconsistent with and adverse to the plaintiff's proprietary rights herein.
 - c. Costs of the suit.
 - d. Any other relief that this Honourable Court may deem fit to grant.
31. In the suit, the trial court delivered judgment on 16th May 2019 in favour of the 2nd appellant. The court noted that the 2nd appellant was a bona fide purchaser for value regarding the suit property. That the allegations of fraud, which would have tainted his title to the suit land were neither distinctly alleged nor proved to the requisite standards.
32. Moreover, in his Statement of Defence dated 2nd December 2019 and lodged at the trial court on 10th December 2019, the 2nd appellant at paragraph 4 stated in part:
- “... the 2nd defendant contends that he is the lawful registered owner of LR no Kanyada/Kanyango/Kalanya/6273 (the suit land herein) having acquired it for value and his said ownership affirmed by a judgment of this honourable court in ELC No. 9 of 2014 *Alex Ombeng Okello v Charles Ochuka and another*, through its judgment rendered on 16th May 2019, a fact well known to the plaintiff (respondent herein) who took part in the same as a witness...”
33. Also, at paragraph 16 of the said Statement of Defence, the 2nd appellant averred that:
- “... the 2nd defendant avers that there is already another case involving him and the plaintiff herein who took part in the same as a witness over the same parcel of land in issue herein LR no Kanyada/Kanyango/Kalanya/6273 and which was already decided in favour of the 2nd defendant. The same is the aforementioned ELC No. 9 of 2014...”
34. Notably, the 2nd appellant produced a copy of the judgment in Homa Bay Chief Magistrate's Court Environment and Land Case No. 9 of 2014, as part of his evidence at the trial court (DExhibit 3).
35. The cardinal principle is that litigation must come to an end; see *Halsbury's Laws of England*, 4th Edition Volume 22 at page 273.
36. In the premises, it is my considered view that the suit at the trial court was *res judicata* Homa Bay Chief Magistrate's Court Environment and Land Case No. 9 of 2014 in light of Section 7 and [*Black's Law Dictionary*](#) (both *supra*).
37. Therefore, the trial court lacked jurisdiction to hear and determine the same.
38. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 4th August 2022 and amended on 3rd June 2024, be and is hereby allowed as prayed therein and as stated in paragraph 3 (a) hereinabove.
39. By dint of the proviso to Section 27(1) of the [*Civil Procedure Act*](#), Chapter 21 Laws of Kenya, costs of this appeal to be borne by the respondent.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMA BAY THIS 23RD DAY OF OCTOBER, 2024.



G.M.A. ONG'ONDO

JUDGE

In the presence of: -

1. Ms. Aluoch Odera, holding brief for Mr. Nyauke, Learned Counsel for the appellants
2. Ms. Mburu Diana holding brief for Mr. Kevin Mochiemo Gichana, Learned Counsel for the respondent
3. 2nd appellant
4. Respondent
5. Luanga, Court Assistant

