



**Omboga v Nyabayo & 2 others (Land Case (Originating Summons)
E004 of 2024) [2024] KEELC 13320 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
LAND CASE (ORIGINATING SUMMONS) E004 OF 2024**

**M SILA, J
NOVEMBER 21, 2024**

BETWEEN

FLORENCE NYABOKE OMBOGA APPLICANT

AND

EVANS NYAMBANE NYABAYO 1ST RESPONDENT

NAFTAL BOAZ ONGERI 2ND RESPONDENT

JOSEPH ONGERI NYABAYO 3RD RESPONDENT

RULING

(Application for injunction; principles to be applied; applicant claiming land measuring 0.39 Ha by way of adverse possession and citing four parcels of land owned by the 1st – 3rd respondents; suit against 3rd respondent, who owns two of the parcels withdrawn; applicant now seeking an order of injunction to restrain the 1st and 2nd respondents; land of the 1st and 2nd respondents measuring only 0.205 Ha which is less than the 0.39 Ha claimed by the applicant; applicant not precise on what portion of land from which title that the disputed land falls in; need to have precision in pointing out exactly what is claimed in a suit for adverse possession; moreover, applicant’s predecessor in title having filed a previous suit which was dismissed; applicants sons also charged and convicted of trespass thus doubt as to whether the possession of the land if at all has ever been peaceful; prima facie case not established; application for injunction dismissed)

1. This suit was commenced through an Originating Summons which was filed on 29 August 2024. The applicant avers that she has filed the suit as the Legal Administratrix of the estate of the late Christopher Omboga Omuria (deceased) and claims adverse possession to portions of the land parcels Wanjare/ Bomariba/3453, 3454, 3455 and 3456, measuring approximately 0.39 Ha. It is her case that on 18 February 1980, the deceased entered into a land sale agreement with the late father of the respondents, one Joseph Onger Nyabayo, in respect of a portion measuring approximately 0.39 Ha out of the



original land parcel Wanjare/Bomariba/1527 before subdivision into the parcels No. 3453-3456. It is averred that the purchase price was Kshs. 4,000/= and that Kshs. 2,000/= was paid when the agreement was executed and the balance of Kshs. 2,000/= paid in two equal instalments of Kshs. 1,000/= each on 31 June 1981 (sic) and 28 August 1982. It is pleaded that following the execution of the sale agreement on 18 February 1980, the applicant's late husband moved into what he had purchased together with his family and commenced occupation. It is pleaded that he constructed a homestead, planted gum trees, and started tilling the land until he died. It is stated that the plaintiff got married to the deceased in 1980 and that she joined him and they continued occupation. It is elaborated that at the time the sale agreement was entered the vendor had not been issued with a title deed but was subsequently registered as proprietor of the parcel No. 1527 on 6 January 2011. This land parcel No. 1527 is now subdivided into the land parcels No. 3453-3456. The parcel No. 3453 is in the name of the 1st respondent, the parcel No. 3454 in the name of the 2nd respondent, and the parcels No. 3455 and 3456 are in the name of the 3rd respondent. It is pleaded that on 6 June 2024, the respondents forcibly entered the disputed land and erected a barbed wire fence carving out a portion of the applicant's land.

2. On 19 September 2024, the respondents filed a Replying Affidavit to the Originating Summons sworn by the 2nd respondent. He deposed inter alia that the suit is res judicata as there was the case Kisii ELC No. 406 of 2015, filed by the deceased whom the plaintiff represents, over the same subject matter which was heard and determined. He deposed that the purported sale agreement dated 13 February 1980 is forged and does not have a land reference number in respect of which it is made. He deposed that it is not true that the applicant was on the land and contended that every respondent is on their parcel of land cultivating peacefully. He deposed that on 22 May 2022 one Dominici Omuria, Gilbert Oporo Oroo, Francis Mose, and Vincent Babu Osore, who are children of the applicant, trespassed into the land forcefully and they reported the matter at Gesonso Police Station. The trespassers were arrested and charged in Kisii Criminal Case No. E807 of 2024 where they pleaded guilty and after mitigation they were warned and discharged under Section 35 (a) of the Penal Code. Documents touching on the two court cases are annexed.
3. On 23 September 2024, the applicant withdrew suit against the 3rd respondent who owns the parcels No. 3455 and 3456.
4. On 14 October 2024, the applicant filed an application of even date under certificate of urgency seeking orders to restrain the 1st and 2nd respondent "from trespassing into the applicant's portion of land measuring approximately 0.39 Ha which cuts across LR Numbers Wanjare/Bomariba/3453, 3454, 3455 and 3456...". It is that application which is the subject of this ruling. The application is supported by the affidavit of the applicant. She avers that the 1st and 2nd respondents were served with summons on 6 September 2024; that on 12 September 2024, they descended upon her fully grown eucalyptus trees with power saws and cut them into logs; that on the same day they descended on her portion measuring 0.39 Ha and proceeded to demolish her house and damaged crops; that on 23 September 2024, they invaded her land and ploughed almost half an acre; that after they had done the destruction they entered appearance on 18 September 2024. She thus beseeches the court to grant her the order of injunction in order to restrain the 1st and 2nd respondents from the land she claims.
5. The 1st and 2nd respondents filed a replying affidavit sworn by the 2nd respondent to oppose the motion. It is contended that it is not true that the applicant has crops on their land parcels No. 3453 and 3454; that the applicant has concealed material facts by not disclosing the previous suit; that the applicant contends to have purchased the land from the 3rd respondent yet she has withdrawn suit against him; that the applicant has not stated exactly where her land measuring 0.39 Ha lies; that the sons of the applicants trespassed into their parcels of land and they pleaded guilty to the charge of trespass.



6. I invited counsel to file submissions to argue the application and I have taken note of the submissions filed.
7. This is an application for injunction and I stand guided by the principles set out in the case of *Giella vs Cassman Brown* (1973) EA 358. In order to obtain an order of injunction, one needs to establish a prima facie case with a probability of success; demonstrate that he stands to suffer irreparable loss unless the injunction is granted; and where the court is in doubt it will decide the case on a balance of convenience.
8. In order to establish whether one has demonstrated a prima facie case with a probability of success, it is inevitable that a preliminary assessment of the case be done and the court has to give an opinion as to whether the applicant has presented a case which on the face of it appears to have chances of success.
9. In our case, the applicant's case is one for adverse possession. To succeed in a case of adverse possession, one is required to demonstrate quiet, open, peaceful, uninterrupted possession for at least 12 years of the land claimed. One of course can claim the whole land comprised in a particular title or only part of it and where only part is claimed the applicant needs to point out exactly which portion of the land is claimed. This would ordinarily be revealed through a survey report.
10. In our case the applicant claims ownership of 0.39 Ha. She however does not state where exactly this 0.39 Ha is located. She does not say how much of it is in the 1st respondent's land and how much of it is in the 2nd respondent's land. I observe that the 1st respondent's land measures 0.155 Ha whereas the 2nd respondent's land measures 0.05 ha. If you add up the two, you will get 0.205 ha which is less than the 0.39 ha that the applicant claims. I wonder how the applicant can now say that she claims 0.39 Ha out of land measuring only 0.205 ha. I have also looked at the survey report that the applicant filed. It mentions that the land parcel No. 1527 is subdivided into the parcels No. 3453 – 3456 but nowhere does it say in which particular title this 0.39 Ha that is claimed by the applicant falls. I do not see much value in that report to say the least.
11. A person claiming adverse possession needs to furnish adequate evidence of what he is in occupation of. Where a portion only is claimed, the applicant must demonstrate the exact size and location of the portion he asserts occupation of within the title claimed. This requirement has been affirmed in case law. For example, in the case of *Joseph Macharia Mwangi v Jonah Kabiru* (2008) eKLR, the applicant filed suit alleging to have acquired 3 acres out of 5.1 acres of the title. The court (Kasango J) was not persuaded that he had put forth sufficient evidence of what he was in occupation of. It was held as follows :

“It was essential in the plaintiff's claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than defendant's. The plaintiff's claim for that reason does fail.”
12. The Court of Appeal also addressed the point in the case of *Titus Mutuku Kasuve vs Mwaani Investments & 4 Others*, Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002 (2004) eKLR. The appellant had filed an originating summons claiming two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession. His suit was dismissed. The Court of Appeal upheld the dismissal, the claim for 20 acres being premature, and the claim for 40 acres being unmaintainable,



inter alia for reason that the appellant had not proved exclusive possession of “any definite and distinct land ascertained to be 40 acres.”

13. It follows that you cannot come to court seeking adverse possession and at the same time not being precise about what you claim. In our case, I see no precision in the claim of the applicant. As I have pointed out, she does not say where this parcel of land alleged to be 0.39 Ha falls.
14. Apart from the foregoing, the applicant, in her pleadings, failed to disclose the previous suit, Kisii ELC No. 406 of 2015 where her husband was the plaintiff. She also failed to disclose that her sons were charged with trespass and they pleaded guilty. Those facts were not only material, but they bring to doubt whether the applicant has had any peaceful occupation of the suit properties, that is if she has been in occupation at all.
15. Given the foregoing issues, which to me militate against the case of the applicant, I am not persuaded, at least at this juncture, that the applicant has demonstrated a prima facie case with a probability of success.
16. That being the position I have no option but to dismiss this application with costs.
17. The result is that the applicant will have to prove her case without the benefit of an order of injunction.
18. Orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF NOVEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Bigogo for the applicant

N/A on the part of Mr. Sagwe for the 1st and 2nd respondents

Court Assistant – David Ochieng’

