



REPUBLIC OF KENYA



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**Okode v Ounda (Environment & Land Case 2 of 2020)
[2025] KEELC 543 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 2 OF 2020
SO OKONG'O, J
FEBRUARY 13, 2025**

BETWEEN

JANES ALARO OKODE PLAINTIFF

AND

MAURICE ONYANGO OUNDA DEFENDANT

JUDGMENT

Background

- 1 The Plaintiff instituted this suit against the Defendant in this court on 8th February 2016. The suit was transferred to the lower court on 18th April 2018 and re-transferred back to this court on 4th November 2019. That was when it was given its current case number. In his plaint dated 18th January 2016, the Plaintiff averred that he was the registered owner of all that parcel of land known as Kisumu/ Kadero Got Nyabondo/1493 (hereinafter referred to as “the suit property”). The Plaintiff averred that he was registered as the owner of the suit property on 25th January 2008 and was issued with a title deed in respect thereof on 8th February 2008. The Plaintiff averred that on 15th November 2015, the Defendant entered the suit property without the consent of the Plaintiff, constructed a temporary structure thereon and started residing therein. The Plaintiff averred that the Defendant’s entry and occupation of the suit property was illegal and amounted to trespass. The Plaintiff prayed for judgment against the Defendant for; a declaration that the Plaintiff was the lawful owner of the suit property, an order of eviction of the Defendant from the suit property, a permanent injunction restraining the Defendant by himself or through his relatives, agents or employees from entering, claiming, occupying, cultivating or in any other manner interfering with the Plaintiff’s quiet possession and ownership of the suit property, and costs of the suit.
- 2 The Defendant filed a statement of defence and a counter-claim against the Plaintiff on 2nd August 2016. The Defendant denied that the Plaintiff was the registered owner of the suit property. The Defendant denied that he had entered the suit property without the Plaintiff’s permission and put



up a structure thereon. The Defendant averred that if any structure was put up on the suit property by the Defendant as alleged by the Plaintiff, the Defendant had a right to put up the same. The Defendant denied that he had trespassed on the suit property. The Defendant averred that he had lived on and occupied the suit property since 1982 and that the Plaintiff's title to the land if any had been extinguished by operation of law. The Defendant averred that the Plaintiff's suit was time-barred.

- 3 In his counter-claim, the Defendant averred that the suit property was sold to his grandfather one, Yare by one, Alfred Ouya Adongo in 1975 and that the Defendant's family had occupied the suit property since then. The Defendant averred that the suit property belonged to his family. The Defendant averred that his parents entered the suit property in 1982 and had enjoyed uninterrupted occupation of the same for over 12 years. The Defendant averred that his parents acquired the suit property lawfully. The Defendant averred that the title held by the Plaintiff for the suit property was acquired fraudulently. The Defendant averred further that the Plaintiff had filed a previous suit in the lower court in 2009 against one, Margaret Atieno Ounda over the suit property which suit was dismissed.
- 4 The Defendant prayed for judgment against the Plaintiff for; a declaration that the Defendant was the registered owner of the suit property by adverse possession, a permanent injunction restraining the Plaintiff and those claiming through him from dealing with the suit property, and the costs of the suit.
- 5 The Plaintiff filed a reply to defence and defence to counterclaim on 23rd July 2018. The Plaintiff reiterated the contents of his plaint and averred that the Defendant violently and forcefully took possession of the suit property shortly before the filing of this suit. The Plaintiff denied that the Defendant entered the suit property in 1975. The Plaintiff averred that the Defendant was not entitled to any relief against the Plaintiff.

The evidence tendered by the parties

- 6 At the trial, the Plaintiff adopted his witness statements dated 31st December 2020 and 1st November 2021 as his evidence in chief. The Plaintiff produced the documents in his bundle of documents filed on 17th August 2021 and 3rd November 2021 as P.EXH. 1 and P.EXH.2 respectively. On cross-examination, the Plaintiff stated that the Defendant entered the suit property by force and was the one occupying the property. He stated that he had sued the Defendant's mother in the lower court and that the court directed that the claim be heard by this court. He stated that when he sued the Defendant's mother, the Defendant's mother and he were both cultivating the suit property. He stated that he was not aware that his suit in the lower court was dismissed for non-attendance. The Plaintiff stated that the Defendant's father was not occupying the suit property and that it was only the Defendant who was in occupation of the suit property. The Plaintiff stated that he came back from Tanzania in 1998 and at the time, the Defendant was not in occupation of the suit property. He stated that it was one Hellena Yongo who was cultivating the suit property. He stated that the Defendant put up his homestead on the suit property in 2015. He denied that the Defendant's father's home was on the suit property and that the Defendant's mother was occupying the same. He stated that the Defendant's mother had her home on a different parcel of land. On re-examination, the Plaintiff stated that the Defendant's mother's homestead was far from the suit property. He stated that it was the Defendant who had a house on the suit property and that he had produced a photograph of the said house.
- 7 The Defendant gave evidence as DW1. The Defendant adopted his witness statement filed in court on 25th June 2019 as his evidence in chief. The Defendant produced the documents in his list of documents filed on 6th March 2019 as D.EXH. 1, 2, and 3, and the documents in his list of documents filed on 25th June 2019 as D.EXH.4. The Defendant stated that Margaret Atieno Ounda was his mother and it was her who was in occupation of the suit property. The Defendant stated that he was staying with his mother on the suit property and that he had occupied the suit property since he was born.



- 8 On cross-examination, the Defendant stated that there was a parcel of land registered in the name of his father namely, Kisumu/Got Nyabondo/575(sic). The Defendant stated that he was 30 years old, married and had a house. He stated that the photograph that was produced in evidence by the Plaintiff was of his mother's house on the suit property. He stated that he did not know the parcel number of the land where the house was standing. He stated that he had not put up his house on the suit property when the photo was taken. He stated that his house on the property was barely 2 years old. He admitted that he was occupying the suit property. He stated that he put up a house on the suit property when he left his father's homestead. The Defendant's second witness was the Defendant's mother, Margaret Atieno Ounda (DW2). DW2 told the court that the Defendant was her eldest son. DW2 adopted her witness statement filed on 2nd August 2016 as her evidence in chief.
- 9 On examination by the court, DW2 stated that the photograph that the Plaintiff produced in evidence was of her house on the suit property and that she put up the house in 2008 after her earlier house got damaged. She stated that she was occupying the suit property with the Defendant. DW2 stated that when the photograph was taken, the Defendant had not put up his house on the suit property. The Defendant called other witnesses, Benter Okungu Achieng (DW3) and Charles Achieng Midigo (DW4). DW3 and DW4 told the court that the Defendant and his mother, Margaret Atieno Ounda were known to them. They stated that the suit property belonged to the Defendant's father and that the Defendant was staying on the land as of right.
- 10 After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 11th March 2024 while the Defendant filed her submissions dated 22nd February 2024.

Analysis and Determination

- 11 I have considered the pleadings, the evidence on record and the submissions filed by the parties. I am of the view that the following are the issues arising for determination by the court in this suit;
- i. Whether the Plaintiff is the owner of the suit property;
 - ii. Whether the Defendant trespassed on the suit property;
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the plaint;
 - iv. Whether the Defendant is entitled to the reliefs sought in the counterclaim; and
 - v. Who is liable for the costs of the suit and the counterclaim?
- 12 I will consider these issues together. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). The Registered [Land Act](#) was repealed by the [Land Registration Act](#), 2012. Sections 27 and 28 of the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed) provide as follows:

- “ 27. Subject to this Act-
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging



or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

13 Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

14 The two sections have been reproduced in Sections 24 and 25 of the [Land Registration Act, 2012](#) as follows:

“24. Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.



- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

15 Section 26 of the *Land Registration Act*, 2012 provides as follows:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

16 I am satisfied from the evidence on record that the Plaintiff is the lawful owner of the suit property. The Plaintiff produced in evidence a copy of the land adjudication record for Kisumu Got Nyabondo Adjudication Section which showed that the suit property was demarcated and recorded in the name of Helena Yongo as the owner thereof during the land adjudication in the area. The Plaintiff also produced the proceedings of the Kisumu District Land Disputes Tribunal in Tribunal Case No. 31 of 2006 between the Plaintiff and Helena Yongo in which the Plaintiff and Helena Yongo agreed that Helena Yongo would surrender the suit property to the Plaintiff in consideration of the Plaintiff paying to her Kshs. 10,000/-. The agreement that was converted into an award of the Tribunal made on 14th March 2007 was registered in the Magistrates’ Court at Kisumu in Kisumu Chief Magistrate’s Court Land Case No. 4 of 2007 and adopted as a judgment of the court on 3rd April 2007.

17 The said judgment has not been varied or set aside. The Plaintiff produced a copy of the register of the suit property which showed that Helena Yongo was the first registered owner of the suit property. She was registered as the owner of the property on 11th September 1992. On 25th January 2008, the name of Helena Yongo was changed in the register of the suit property to Herine Anyango Onyango. On the same date, the suit property was transferred and registered in the name of the Plaintiff. The Plaintiff was subsequently issued with a title deed on 8th February 2008 which he also produced in evidence. Helena Yongo has not challenged the Plaintiff’s title.

18 The Plaintiff produced evidence showing that the Defendant’s mother, Margaret Atieno Ounda(DW2) challenged Helena Yongo’s title at the same Tribunal in Tribunal Case No. 46 of 2006. In an award made on 8th October 2008, the Tribunal upheld Helena Yongo’s title to the suit property. That decision was also adopted as a judgment of the court by the Chief Magistrate’s court at Kisumu in Land Case No. 42 of 2008. From the foregoing, I am satisfied that the Plaintiff acquired the suit property lawfully. The Defendant has not proved the allegations of fraud pleaded against the Plaintiff. I therefore find that the Plaintiff is the lawful owner of the suit property.

19 The Plaintiff averred that the Defendant entered the suit property on 15th November 2015 and put up a structure thereon. At the trial, the Defendant admitted that he had put up a house on the suit property. In his defence in which he denied putting up any structure on the suit property, the Defendant averred that if at all he had put up a structure on the property, he did so as of right. In his witness statement



which he adopted as part of his evidence in chief, the Defendant stated that he had lived with his parents on the suit property since he was born. In the statement, the Defendant claimed that their family home was on the suit property and that he had not built any house on the suit property. In her witness statement which she also adopted as her evidence in chief, the Defendant's mother, Margaret Atieno Ounda (DW2) claimed that she had occupied the suit property on which she also had her matrimonial home since 1972 when she got married to the Defendant's father, Richard Ounda Oyare, deceased.

- 20 In the proceedings of the Tribunal Case No. 31 of 2006 between the Plaintiff and Helena Yongo, one of the witnesses called by the Plaintiff, one John Omolo told the Tribunal on 17th October 2006 that the Defendant's mother Margaret Atieno Ounda (DW2) was found cultivating the suit property and when asked whether she had a title to the property, she denied that she had any. In her own Tribunal Case No. 46 of 2006, the Defendant's mother Margaret Atieno Ounda (DW2) told the Tribunal on 24th April 2008 that her father-in-law, one, Yare gave her the suit property when she got married in the family in 1982 and that "I have been tilling it to date." Her prayer to the Tribunal concerning the property was, "I am therefore requesting the court to help me take full possession of it". When asked by the Tribunal if she had developed the suit property, she answered that she had planted blue gum trees on the land.
- 21 It is clear from the foregoing that the Defendant's mother Margaret Atieno Ounda (DW2) was not in occupation of the suit property as of 24th April 2008 when she gave evidence before the Tribunal. In the suit that the Plaintiff brought against the Defendant's mother, Margaret Atieno Ounda (DW2) in the lower court in 2009 (Kisumu CMCC No. 294 of 2009) which was dismissed by the court for non-attendance, the Plaintiff had averred that Margaret Atieno Ounda (DW2) entered the suit property in 2008 and occupied the same. From the foregoing, I am of the view that if the Defendant's mother had put up her homestead on the suit property which she occupied with her children including the Defendant, such a homestead could only have been put up after 24th April 2008. The Defendant who claimed that he lived with his mother on the suit property before constructing his own house thereon later, could only have started living on the property with his mother (DW2) if at all from 2008 at the age of 14. When he testified before this court on 8th February 2024, the Defendant told the court that he was 30 years old meaning he was born in 1994. The Plaintiff filed this suit against the Defendant on 8th February 2016. As of this date, the Defendant had not acquired any proprietary interest in the suit property that would give him the right to put up a house or any other structure on the suit property. Since the suit property was owned by the Plaintiff and the Defendant had not obtained permission from the Plaintiff to put up a house on the property, the Defendant's action of putting a house on the suit property was an act of trespass. It is my finding therefore that the Defendant trespassed on the suit property.
- 22 Having made a finding that the Plaintiff is the lawful owner of the suit property and that the Defendant trespassed on the suit property which trespass is continuing, it is my further finding that the Plaintiff is entitled to the reliefs sought in the plaint. I find no merit in the Defendant's counterclaim against the Plaintiff. As I have observed above, the earliest the Defendant could have entered the suit property was in 2008 and even at that time, he was a minor. The Defendant reached the age of majority in 2012. If the Defendant had to acquire prescriptive rights in the suit property, time could only start running in his favour in 2012. Whether the time started running in 2008 or 2012, the Defendant had not occupied the suit property for 12 years at the time the Plaintiff brought this suit for his eviction from the suit property in 2016. The Defendant is therefore not entitled to the reliefs sought in his counterclaim. The Defendant had also contended in his submissions that the Plaintiff's suit was res judicata. I find no merit in this objection to the suit. First, the issue of res judicata was not pleaded in the defence



and counterclaim. Secondly, the suit that the Plaintiff had filed against the Defendant's mother was dismissed for non-attendance. The suit was not heard and determined on merit.

- 23 On the issue of costs, in Halbury's Laws of England, 4th Edition (Re-issue), [2010] Vol. 10, para 16 the authors stated as follows:

The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".

- 24 In Cecilia Karuru Ngayu v. Barclays Bank of Kenya & another [2016] eKLR, the court adopted with approval the decision in Republic v. Rosemary Wairimu Munene, Ex-Parte Applicant and Ihururu Dairy Farmers Co-operative Society Ltd. where it was stated that:

The issue of costs is at the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

- 25 The Plaintiff has succeeded in his claim while the Defendant's counterclaim has been found to have no merit. I find no good reason why I should deny the Plaintiff the costs of the suit and the counterclaim.

Conclusion

- 26 In conclusion, I find the Plaintiff's case against the Defendant proved on a balance of probabilities and the Defendant's counterclaim not proved. I therefore enter judgment for the Plaintiff against the Defendant for;

- a. A declaration that the Plaintiff is the lawful proprietor of the parcel of land known as Kisumu/Kadero Got Nyabondo/1493.
- b. An order that the Defendant shall vacate the parcel of land known as Kisumu/Kadero Got Nyabondo/1493 within 120 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for a warrant for his forceful eviction from the property.
- c. An order of a permanent injunction restraining the Defendant either by himself, his agents, servants, employees or any other person deriving authority or title from him from entering, occupying, cultivating or in any manner interfering with the Plaintiff's possession, ownership and occupation of Kisumu/Kadero Got Nyabondo/1493 once the Defendant vacates or is evicted from the property pursuant to order (b) above.
- d. The Defendant's counterclaim is dismissed.
- e. Costs of the suit and the counterclaim.

DELIVERED AND DATED AT KISUMU ON THIS 13TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:



Mr. Anyul for the Plaintiff

Mr. Yogo for the Defendant

Ms. Maureen-Court Assistant

