



Dinda & 14 others v Okello & another (Environment and Land Case Civil Suit 04 of 2020) [2024] KEELC 14227 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 14227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE CIVIL SUIT 04 OF 2020
GMA ONGONDO, J
NOVEMBER 20, 2024**

IN THE MATTER OF LAND PARCEL NUMBER SUNA EAST WASWETA 1/29

AND

**IN THE MATTER OF SECTIONS 7,13 (1), 17, 37 AND 38 OF THE
LIMITATION OF ACTIONS ACT CAP, 22 LAWS OF KENYA**

AND

**IN THE MATTER OF ORDER 37 RULES 7 AND
14 OF THE CIVIL, PROCEDURE RULES, 2010**

BETWEEN

- JASON ONYURO DINDA 1ST PLAINTIFF**
- PAUL OKECH DINDA 2ND PLAINTIFF**
- JUSTOR ALOO DINDA 3RD PLAINTIFF**
- SILAS ALUOCH DINDA 4TH PLAINTIFF**
- MOURICE OUMA DINDA 5TH PLAINTIFF**
- JAMES OKOTH OUMA 6TH PLAINTIFF**
- MUSA OTIENO DINDA 7TH PLAINTIFF**
- SAMWEL KENYATA OKOTH 8TH PLAINTIFF**
- DAVID ONYANGO ABONYO 9TH PLAINTIFF**
- NICK OTIENO ONYURO 10TH PLAINTIFF**
- PATRICK OOKO ONYURO 11TH PLAINTIFF**
- BONFACE ODHIAMBO ONYORO 12TH PLAINTIFF**
- BENARD OKOTH ONYURO 13TH PLAINTIFF**



ISHMAEL OKOTH ONYURO 14TH PLAINTIFF

JOSEPH ODHIAMBO ABONYO 15TH PLAINTIFF

AND

PRISCAR AKECH OKELLO 1ST DEFENDANT

JOSEPH OJWANG YOYA 2ND DEFENDANT

JUDGMENT

1. The central property in the present suit is land reference number Suna East/Kakrao/460 measuring approximately Twenty Six Decimal Zero Hectares (26.0 Ha) in area, the suit land herein.
2. The plaintiffs are represented by Nelson Jura and Company Advocates.
3. The defendants are represented by Omonde Kisera and Company Advocates
4. Originally, the suit was lodged at Kisii Environment and Land Court before it was transferred to this court for hearing and determination.
5. By an amended originating summons dated 9th February 2021, the plaintiffs have sued the defendants and claim ownership of the whole of land parcel No. Suna East Kakrao/460 measuring 26.0 (The suit land) by way of adverse possession and for the orders infra;
 - a. A declaration that Jason Onyuro Dinda, Paul Okech Dinda, Justor Aloo Dinda, Silas Aluoch Dinda , Mourice Ouma Dinda, James Okoth OUma, Musa Otieno Dinda, Samwel Kenyatta Okoth, David Onyango Abonyo, Nick Otieno Onyuro, Patrick Ooko Onyuro, Bonface Odhiambo Onyuro , Benard Okoth Onyuro, Ishmael Okoth Onyuro and Joseph Odhiambo Abonyo, the plaintiffs/Applicants, have acquired a lawful and absolute title of the whole of the suit land by their joint and collective adverse possession of the land for a period in excess of twelve (12) years.
 - b. A declaration that the plaintiff's joint collective adverse possession of the whole of the suit land for period in excess of twelve (12) years had long extinguished the 1st defendant's/respondent's, Priscar Akech Okelo's title to the whole of the suit land as at 15th December 2015 when she purportedly transferred the whole of the said title to the 2nd defendant/ respondent, Joseph Ojwang Yoya.
 - c. A declaration that the 1st defendant, Priscar Akech Okelo, did not have capacity to transfer the title of the suit land to the 2nd defendant, Joseph Ojwang Yoya as at 15th December 2015 as the plaintiff's joint and collective adverse possession of the whole of the suit land for period in excess of twelve (12) years had long extinguished the 1st defendant's / respondent's, Priscar Akech Okelo's title to the whole of the said title to the 2nd defendant/respondent, Joseph Ojwang Yoya.
 - d. A declaration that the 2nd defendant/respondent, Joseph Ojwang Yoya acquired 26.0 illegally in bad faith with the main intention of defeating the ends of justice without doing due diligence and thus his title should be revoked because the plaintiff's joint occupation of the said land has been so open with several houses that had the 2nd defendant been acting in good faith he would have bothered to confirm the interest of the plaintiffs on the said land.



- e. An order, directed at the County Lands Registrar Migori County, that, Jason Onyuro Dinda, Paul Okech Dinda, Justor Aloo Dinda, Silas Aluoch Dinda, Mourice Ouma Dinda, James Okoth Ouma, Musa Otieno Dinda, Samwel Kenyatta Okoth, David Onyango Abonyo, Nick Otieno Onyuro, Patrick Ooko Onyuro, Ishmael Okoth Onyuro and Joseph Odhiambo Abonyo, the Plaintiffs, be registered as the proprietors of the whole of the suit land parcel of Priscah Akech Okelo and /or Josesph Ojwang Yoya the 1st and 2nd Defendants respectively.
 - f. An Alternative Order that the 2nd Defendant transfers the said portion of the suit land to the plaintiff's and, in the Defendant's default, the Deputy Registrar of this court be at liberty to execute all the relevant instruments in execution of that order, in the place of the Defendant.
 - g. The costs of this suit be provided for.
6. The 1st plaintiff, Jason Onyuro Dinda (PW1) testified that he was a farmer aged 50 years sued together with his step brothers who are the other plaintiffs and has authority to testify on their behalf-PExhibit 1. He relied on affidavit sworn on 20th January 2020 as part of his evidence in chief and annexed documents PExhibits 2 (a) to 7) including proceedings in Kisii High Court Civil Suit No. 179 of 1989 (PExhibits 2(a) to (m) and 3 herein. That he was a party to the suit so was the 1st defendant but he could not tell how it ended. That he lived together with his co-plaintiffs since birth on the suit land and that the youngest plaintiff is the 4th plaintiff who was born in 1968.
 7. Under cross examination, PW1 stated the 2nd defendant had sued him together with his co-plaintiffs. That the 2nd defendant who is the registered owner of the suit land sought eviction against them thereof.
 8. In the submissions dated 26th January 2024, the plaintiffs' position is that this suit be allowed as the plaintiffs have proved that they have acquired lawful and absolute ownership of the suit land by way of adverse possession jointly and collectively. Learned counsel for the plaintiffs submitted in part that the 1st defendant did not have capacity to transfer the title of the whole suit land to the 2nd defendant as at 15th December 2015. That the 2nd defendant did admit that he did not pay any consideration to the 1st defendant for the purchase of the suit land and that he is holding the same in trust for the 1st defendant.
 9. Replying affidavit sworn on 14th October 2022 by the 2nd defendant, the suit is opposed. The defendant averred in part that the acquisition of ownership of the suit land was lawful and procedural as Standard Chartered Bank sold it in the year 1984 under statutory power of sale to Ephraim Okelo Nyariaro who then transferred the same to Eunice Njeri and the 2nd defendant in the year 1985. That there was Kisii High Court Civil Suit No. 179 of 1989 involving the same parties and the suit land hence, the plaintiffs' occupation of the suit land has not been continuous and peaceful.
 10. DW1, Joseph Ojwang Yoya who is the 2nd defendant relied on the replying affidavit as part of his evidence in chief and stated, inter alia, that the suit land got registered in his name in 2015. That the plaintiffs are not in occupation of the suit land. That the suit should not be allowed in view of the previous case at Kisii hence, the suit be dismissed.
 11. During cross examination, DW1 stated that the plaintiffs were in possession of the suit land at the time it was transferred to him by the 1st defendant. That the suit land is held in trust and the plaintiffs own a homestead thereon. That plaintiffs disallowed him to use it and there is a previous case involving them over the suit land.
 12. The defendants' counsel filed submissions dated 5th December 2023 providing the background of the case including that the suit land which was first registered in the name of Albert Dinda on 10th May



1973. It was submitted that the title of it was charged to Standard Chartered Bank to secure a loan on 18th October 1976 That the said bank exercised it's statutory power of sale and sold it to Ephraim Okelo Nyariaro at Kshs. 55, 000/= in the year 1984. That then Ephraim transferred it to Eunice Njeri (Deceased) and the 1st defendant in 1985. title transferred to 2nd defendant on 15th December 2015. Counsel delineated four issues and discussed them in favour of the defendants.
13. To fortify the submissions, counsel cited sections 7, 13, 17 and 38 of the *Limitation of Actions Act* Chapter 21 Laws of Kenya, *Samwel Kihamba-vs-Mary Mbaisi* (2015) eKLR on elements of adverse possession in Latin phraseology, nec vi nec clam, nec precario. That PW1 disowned the plaintiffs' evidence in numerous photographs being part of evidence in cross examination and that there is no nexus between the houses and structures in the photographs and the suit land. That no proof of possession of the suit land and PW1 admitted in cross examination that the possession has not been peaceful as revealed in the previous proceedings (PExhibits 2 (a) to (m) and 3). That correspondence from the chief's office shows that possession in contest. That the plaintiffs' claim is absurd and misplaced claim not proved. That therefore, the suit be dismissed with costs to the defendants.
 14. Order 15 of the *Civil Procedure Rules* 2010 provides for framing of issues and materials from which such issues can be framed in a suit. The plaintiffs set out questions for determination on the face of the amended originating summons while in their submissions, the defendants framed four issues for determination including whether the plaintiffs have proved adverse possession on a balance of probabilities.
 15. I have carefully considered the parties' respective pleadings, evidence, issues framed for determination and written submissions. Thus, it is my considered view that the issues for determination crystallize to the position taken by the Court of Appeal in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another* (2015) eKLR, that adverse possession dictates as follows;
 - a. The parcel of land in dispute 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.
 16. Moreover, the applicant must show that possession was without the permission of the owner of the land in dispute; see *Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi* (2020) eKLR.
 17. It is notable that the plaintiff's claim is for the 26.0 hectares in area as stated in paragraph 1 hereinabove. Therefore, the plaintiffs' claim is over a definite portion of land as held in *Muthuita -vs- Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
 18. There is no dispute that the registration of the suit land is in the name of the 2nd defendant herein.
 19. It is well settled that possession can take different forms including fencing and cultivation; see *Titus Onganga Nyachio-vs-Martin Okioma Nyauma* (2017) eKLR.
 20. Rights and registrations of land can be challenged on grounds of fraud, misrepresentation and adverse possession; see *Tayebali Admji Alibhai-vs-Abdulhussein Adamji Alibhai* (1938) 5 EACA 1 applied in *Kimani Ruchine and another-vs-Swift Rutherford Co. Ltd & another 91976-80* 1KLR 1500, among other authoritative pronouncements.



21. In adverse possession the owner ceases to possess the land.....there must be denial of owner title in the form or another, for possession to be adverse; Halsbury's Laws of England 4th Edition Volume 28
22. The applicant in adverse possession claim must prove exclusive uninterrupted possession of the land in dispute for a period in excess of 12 years; as held in Wilson Katana and Ruchine cases (supra0 as well as Salim-vs-Boyd (1971) EA 550.
23. It is observed from the proceedings in Kisii High Court Civil Suit No. 179 of 1989 (PExhibits 2(a) to (m) and 3) that PW1 was a party to the suit so was the 1st defendant. could not tell how it ended.
24. PW1 admitted in cross examination that their possession of the suit land has not been peaceful as revealed in the previous proceedings (PExhibits 2 (a) to (m) and 3) herein.
25. Also, correspondence from the chief's office shows that possession of the suit land has been contentious.
26. Indeed, PW1 stated in examination in chief that;

'I wish to rely on the contents of the said affidavit. The annexures are marked as PE 2 (a) to (m) and PEx 3 proceedings of Kisii High Court civil suit No. 179 of 1989....'
27. In cross examination, PW1 confirmed that he was sued together with his co-plaintiffs in Kisii High Court Civil suit No. 179 of 1989 by the defendants pertaining to the suit land. That the 2nd defendant sought eviction orders against them in that suit.
28. DW1 confirmed in in cross examination that there was the previous case, Kisii Hig Court Civi Suit No. 179 of 1989 thus;

'...I know the case in Kisii was between the 1st defendant and the 1st plaintiff and other defendants. It was case number 179 of 1989. She was seeking orders of eviction....'
29. In that regard, apart from proof of the first ingredient of adverse possession, the other ingredients thereof are not proved in this suit. I affirm the defendants' assertion that the suit is absurd and misplaced. So, the plaintiffs have failed to prove their claim on a balance of probability.
30. A fortiori, this suit, be and is hereby dismissed.
31. Costs of the suit to the defendants by dint of the proviso to section 27 (1) of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.

DATED AND DELIVERED AT MIGORI THIS 20TH DAY OF NOVEMBER 2024

G M A ONGONDO

JUDGE

In the presence of;

David Otieno instructed by Jura learned counsel for plaintiffs

Omonde Kisera learned counsel for defendants

Tom Maurice, court assistant

