



**Dache v Odero alias Odera Ajungu (Enviromental and Land Originating Summons E003 of 2023) [2024] KEELC 13220 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13220 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023  
GMA ONGONDO, J  
NOVEMBER 12, 2024**

**BETWEEN**

**PETER OWUOR DACHE ..... PLAINTIFF**

**AND**

**AKIRI AJUNGU ODERO ALIAS ODERA AJUNGU ..... DEFENDANT**

**JUDGMENT**

1. On 3<sup>rd</sup> February 2023, the plaintiff who is represented by L. K. Obwanda Advocates, initiated the instant suit by way of an Originating Summons dated 31<sup>st</sup> January 2023, pursuant to Order 37 Rule 7 of the *Civil Procedure Rules 2010* as read with Section 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya seeking determination of the questions and the orders infra:
  - a. Whether the plaintiff herein is entitled under Section 38 of the *Limitation of Actions Act* to be registered as the absolute proprietor of a portion of land comprised in Land Registration No. Kabuoch/ Kachieng/394 measuring approximately 1 ¼ acres (the suit land herein).
  - b. Whether the defendant is the registered owner in trust of a portion of the suit land for the plaintiff.
  - c. Whether the plaintiff is entitled to equitable share and benefit of a portion of the suit land.
  - d. Whether the trust created herein should be determined and the portion stated shared equitably taking into account past benefits derived by the plaintiff.
  - e. Whether the defendant should transfer the said portion of the suit land to the plaintiff.
  - f. Whether in default of the defendant to transfer the said portion of the suit land, the Deputy Registrar of the court should execute all such documents as may be necessary for the registration of the plaintiff as proprietor of the portion of the suit land.



- g. That the plaintiff has acquired title to the suit land by adverse possession.
  - h. An order of rectification of the register directing the Land Registrar of Homa Bay to delete the name of Akiri Ajungu Odero Alias Odera Ajungu on a portion of the suit land and substitute it by the name Peter Owuor Dache.
  - i. Whether the defendant should pay the costs of this Originating Summons.
2. The originating summons is anchored on grounds (i) to (iv) on the face thereof and a fourteen (14) paragraphed supporting affidavit of the plaintiff sworn on even date and a copy of the land sale agreement (POD-1) and photographs showing the developments on the disputed portion (POD-3) annexed to the affidavit. The plaintiff deposed, inter alia, that he purchased the disputed portion of the suit land from the defendant on 28<sup>th</sup> December 2006. That, however, the defendant did not effect a transfer of the same to his name and has frustrated his efforts to obtain the consent of the Land Control Board. That he has been in open occupation of the same for a period in excess of 17 years, in the presence of and with the full knowledge of the defendant. That further, he has substantially developed the disputed portion of the suit land by constructing a permanent house and carrying out cultivation thereon.
  3. PW1, Peter Owuor Dache, relied on his statement and supporting affidavit both dated 31<sup>st</sup> January 2023, which were adopted as part of his evidence. He further relied on the list of documents of even date serial numbers 1 to 5, to wit, a copy of sale agreement dated 28<sup>th</sup> December 2006, a copy of official search certificate dated 15<sup>th</sup> December 2006, a copy of the receipt for search certificate dated 18<sup>th</sup> December 2009, a copy of the signed consent form and pictures of the plaintiff's homestead (PExhibits 1 to 5 respectively). He stated that he lives on the suit land and utilizes 1 ¼ acres of the same.
  4. During cross-examination, he stated that his entry into the suit land was as a result of the sale agreement (PExhibit 1). He admitted that PExhibit 5 was not backed by a Surveyor's Report. That he obtained PExhibit 4 in 2022.
  5. PW2, Janes Otieno Owuor, relied on his statement dated 23<sup>rd</sup> May 2023, which was adopted as part of his evidence. Upon cross-examination, he stated that he is a son to PW1 and witnessed the execution of PExhibit 1. That PW1 stays on the suit land.
  6. PW3, George William Nyaloo, relied on his statement dated 23<sup>rd</sup> May 2023, which was adopted as part of his evidence. He testified that PW1 has put up a permanent house alongside a semi-permanent house in one homestead on the portion of the suit land.
  7. During cross-examination, PW3 admitted that there is a boundary made of sisal plants between the permanent and semi-permanent structures that comprise the plaintiff's homestead. He further stated that he was not a witness to PExhibit 1.
  8. The defendant, through Quinter Adoyo and Company Advocates, opposed the claim vide a Replying Affidavit sworn on 28<sup>th</sup> March 2023. He deposed in part that he is elderly, aged 86 years old, the lawful owner and first registered proprietor of the suit land with an absolute and indefeasible title. That he entered into a lease agreement for a period of 16 years with the plaintiff herein, because the plaintiff needed to plant blue gum trees that were brought by a Denmark Non-Governmental Organisation, and the plaintiff knew that the trees would be mature and ready for harvesting in 16 years when he would now vacate the land.



9. He averred that there is neither a valid sale of land agreement nor a valid claim for adverse possession that this court can enforce, since consent of the Land Control Board was not obtained within the prescribed six months under Section 8 of the *Land Control Act*.
10. DW1, Akiri Ajungu Odero alias Odero Ajungu, relied on his Replying Affidavit sworn on 28<sup>th</sup> March 2023 and annexed documents marked as AJO-01 to AJO-07, to wit, a copy of the defendant's National Identity Card, a copy of the official search certificate for the suit land, a copy of DW3's National Identity Card, a copy of a letter from the District Commissioner dated 9<sup>th</sup> June 2006, copies of the National Identity Cards for Anatasia Adhiambo Otoch and Joanes Agutu Okayo and a copy of the Land Control Board consent form. He testified that the plaintiff leased the disputed portion of the suit land from him for a period of sixteen (16) years. That he thumb-printed on a lease agreement to that effect. That he is illiterate. During cross-examination, he insisted that he did not sell the disputed portion to PW1, but only leased out the same.
11. DW2, Paul Odhiambo Ochuka, relied on his statement dated 5<sup>th</sup> July 2023, which was adopted as part of his evidence. In cross-examination, he stated that PW1 does not reside on the suit land. That PW1 did not purchase the disputed portion of the suit land but only leased it.
12. John Ochuka, DW3, relied on his statement dated 5<sup>th</sup> July 2023, which was adopted as part of his evidence. That PW1 has built his homestead on a neighbouring parcel. That on the suit land, PW1 has erected a cowshed and a latrine. On cross-examination, he conceded that apart from the temporary structures aforementioned, PW1 has planted bubblegum trees upon the suit land. That the late Joshua Obat who was a clan elder signed PExhibit 1. That the parties herein did not register the lease agreement that they entered into at the Lands Office. That the plaintiff has utilized the suit land since 2006.
13. The plaintiff's counsel filed submissions dated 13<sup>th</sup> February 2024 and identified the following issues for determination:
  - i. Whether the plaintiff and the defendant entered into a sale agreement and/or any lease agreement and if so, whether they became null and void upon failure on the defendant obtaining consent.
  - ii. Whether the occupation and possession by the plaintiff over a portion of the suit land measuring approximately 1 ¼ acres constituted adverse possession.
  - iii. Whether the plaintiff at the time of institution of the suit had acquired title to the said portion of the suit land by adverse possession and hence entitled to be registered as owner in place of the defendant?
  - iv. Who bears the costs of the suit?
14. Learned counsel submitted that the parties entered into a valid sale agreement dated 28<sup>th</sup> December 2006. That upon full payment of the purchase price and failure by the defendant to acquire consent of the Land Control Board within 6 months, the plaintiff's possession and occupation of the disputed portion became adverse. That after expiry of 12 years therefrom, the registered owner's title became extinguished by operation of the law and the plaintiff became entitled to be registered as the owner thereof.
15. Further, counsel submitted that following the sale, the plaintiff entered the suit land in 2009 and erected a cowshed and latrine thereon, as confirmed by the defendant and his witnesses and as evidenced by the pictures produced in evidence. That the plaintiff has been in actual and constructive possession of the disputed portion of the suit land for a period exceeding twelve years and has thus,



- acquired title to the same by way of adverse possession. Reliance was placed on various authoritative pronouncements, including the case of *Wambugu v Njuguna* (1983) KLR 173, to buttress the submissions.
16. The defendant's counsel filed submissions dated 15<sup>th</sup> March 2024 and identified three issues for determination inter alia:
    - i. Whether the applicant and the respondent entered into the sale of land agreement dated 28th December, 2006.
    - ii. Whether the occupation and possession by the applicant over the suit land parcel constituted adverse possession
    - iii. Who bears the costs of the suit?
  17. Learned Counsel submitted that the plaintiff's sale agreement is a forgery since the defendant is illiterate and unable to read and write, yet the sale agreement portrays that he wrote his name on it. That all the signatures for the seller's witnesses appear to have been made in the same handwriting and are not genuine. That further, DW2, John Ochuka, was not present during the execution of PExhibit 1 but is indicated as having attested to the same.
  18. Also, counsel submitted that there was no land sale agreement between the parties hence, the failure to obtain the consent of the Land Control Board as required under Section 8 of the *Land Control Act*. That what existed between the parties was a lease agreement for a period of 16 years. That the applicant had leased the land in order to plant blue gum trees on the suit land, which he knew would be mature and ready for harvesting in 16 years when he would now vacate the land. That the plaintiff having entered the suit land with the consent of the defendant, such possession cannot qualify to be adverse.
  19. Counsel submitted that in any case, the time for adverse possession started to run on 28<sup>th</sup> June 2022 when the lease period ended. That no survey report was produced in evidence to confirm that the plaintiff has established his homestead comprising of a permanent house on the suit land. That therefore, the plaintiff has not discharged his burden of proving the case to the requisite standard and the same ought to be dismissed with costs. Counsel relied on the case of *Gabriel Mbui v Mukindia Muranya* (1993) eKLR, among others, to reinforce the submissions.
  20. I have anxiously considered the parties' respective pleadings, evidence and the rival written submissions. The issue for determination is whether the plaintiff has met the threshold for the orders set out on the face of the originating summons and as noted in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshein and another* (2015) eKLR, that adverse possession dictates thus;
    - 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.
  21. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi v Ben Munyitwa Songoi* (2020) eKLR.



22. It is important to note that the plaintiff's claim is for part of land parcel number Kabuoch/Kachieng/394 (the suit land herein) measuring approximately 1 ¼ acres in area. So, the plaintiff's claim is over a definite portion of land as held in *Muthuita v Wanoe & 2 others* (2008) 1KLR (G&F) 1024.
23. In the first instance, the suit land is registered in the name of Odera Ajungu, the defendant herein. This is evidenced by a copy of the official search certificate dated 15<sup>th</sup> December 2006 (PExhibit 2 and DExhibit 2). The same indicates the approximate acreage of the suit land as one decimal four hectares (1.4 Ha).
24. Concerning the issue of open and exclusive possession, the plaintiff (PW1) testified that he lives on the suit land and utilizes 1 ¼ acres thereof. He averred that he has built his homestead on the disputed portion and produced pictures as proof of the same (PExhibit 5). His testimony was corroborated by PW2 and PW3 as PW2 stated that PW1 stays on the suit land while PW3 asserted that PW1 has established structures on the suit land.
25. The defendant contended that PExhibit 5 was not backed by a Surveyor's Report. However, the plaintiff's possession of the portion of the suit land was affirmed by DW1 who admitted during cross-examination that the plaintiff has planted trees on the disputed portion of the suit land. Also, DW3 stated that:
- “ ... PW1 has erected a cowshed, latrine and planted bubblegum trees as shown in PExhibit 5...”
26. It is established law that possession can take different forms such as fencing or cultivation of the land in dispute; see *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma & 3 others* (2017) eKLR.
27. As regards the period of possession and having dispossessed the owner, the plaintiff asserted that he has been in open, quiet and peaceful use of the suit land for a period in excess of 12 years. The plaintiff deposed, inter alia, that he purchased the disputed portion of the suit land from the defendant on 28<sup>th</sup> December 2006. That, however, the defendant did not effect a transfer of the same to his name and has frustrated his efforts to obtain the consent of the Land Control Board. That he has been in open occupation of the same for a period in excess of 17 years, in the presence of and with the full knowledge of the defendant herein.
28. The defendant, however, stated that he only entered into a lease agreement for a period of 16 years with the plaintiff. That there is no valid sale of land agreement since PExhibit 1 is a forgery and consent of the Land Control Board was not obtained within 6 months of the agreement as required by law. That DW2, John Ochuka, was not present during the signing of PExhibit 1 but is indicated as having attested to the same. That the plaintiff having entered the suit land with the consent of the defendant, such possession cannot qualify to be adverse.
29. This court is cognizant of Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya. Further, I am guided by the prevailing jurisprudence on the same. However, I note that the instant suit was instituted after the lapse of 6 years from the date of execution of PExhibit 1.
30. The defendant averred that the sale agreement was a forgery. Notably, during cross-examination, he admitted thumb printing the same. DW1 stated thus:

“...I thumb printed PExhibit 1 upon request by government officials...”



31. Further, DW1 conceded that the plaintiff did not sign the lease agreement that the parties allegedly entered into. He stated that:
- “...PW1 refused to sign DMFI 3...”
32. Further, DW3 pointed out to the validity of PExhibit 1 during cross-examination. He affirmed that the same was signed by a Clan Elder who is presently deceased. DW3 stated:
- “...The late Joshua Obat who was then Acting Chief of the area. He was a clan elder and he signed PExhibit 1...”
33. As regards fraud, I subscribe to the Court of Appeal decision in [Kinyanjui Kamau v George Kamau](#) [2015] eKLR where the court expressed itself as follows;
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved...”
34. Clearly, the existence of fraud cannot be inferred from the facts; see [Vijay Morjaria v Nansingh Madhusingh Darbar & Another](#) [2000] eKLR
35. In view of the foregoing, it is my considered view that the defendant did not adduce sufficient evidence to prove fraud on the part of the plaintiff. Besides, no lease agreement was produced in evidence to corroborate the defendant’s contention that the parties only entered into a lease agreement as opposed to an agreement for sale of land. To that end, it is my finding that the sale (PExhibit 1) was valid and enforceable by virtue of equitable estoppel and constructive trust; see [Willy Kimutai Kitilit v Michael Kibet](#) (2018) eKLR.
36. So, this court subscribes to the Court of Appeal’s decision in [Willy Kimutai Kitilit](#) (*supra*) where the court held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust. The court noted that:
- “...since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the [Land Control Act](#) where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board...”
37. Furthermore, in [Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri](#) (2014) eKLR, the Court of Appeal observed:
- “...The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property...”
38. I further note that DW3 admitted that the plaintiff has utilized the suit land for a period exceeding twelve years. He stated that:
- “... PW1 has used it since 2006...”
39. Clearly, the plaintiff has been in possession of the portion of the suit land for a period in excess of twelve (12) years. Therefore, it is my considered view that the plaintiff has proved the ingredients of adverse possession to the requisite standard as held in the case of *Wilson Kazungu Katana* (*supra*).



40. Moreover, it is the finding of this court that the respondent proved, to the requisite standard, the existence of a constructive trust over a portion of the suit land measuring  $1 \frac{1}{4}$  acres in area.
41. Accordingly, the instant suit generated by way of an Originating Summons dated 31<sup>st</sup> January 2023 is hereby allowed in terms of orders 1 to 9 as indicated in paragraphs 1 (a) to (i) hereinabove.
42. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 12<sup>TH</sup> DAY OF NOVEMBER 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

Ms. Kimberly holding brief for Ms. Obwanda, Learned Counsel for the plaintiff

Ms. Quinter Adoyo, Learned Counsel for the defendant

Plaintiff

Mutiva, Court Assistant

