



**Waiswa v Otunga (Environment & Land Case 87 of 2019)  
[2023] KEELC 134 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 134 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 87 OF 2019  
DO OHUNGO, J  
JANUARY 24, 2023**

**BETWEEN**

**MUSA CHEBI WAISWA ..... PLAINTIFF**

**AND**

**CHRISTINE ANYANGO OTUNGA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court through Originating Summons (OS) dated July 22, 2019. He averred that he had become entitled to 1 acre of the parcel of land known as N/Wanga/Mayoni/1926 (the suit property) by adverse possession. He therefore sought the following orders:
  - a. A declaration that the Applicant having been in actual, exclusive, peaceful, open, uninterrupted and actual possession of one acre out of LR No North Wanga/Mayoni/1926 measuring 1.45 hectares or thereabouts, for a continuous period of time exceeding 25 years and that the applicant has acquired title of the said one acre out of LR No North Wanga/Mayoni/1926 by virtue of adverse possession or prescription.
  - b. That this Honourable court be pleased to find that any rights of the Respondent may have had in one acre portion out of land title No North Wanga/Mayoni/1926 in possession of the Applicant got extinguished upon the expiry of twelve years after the entry of the Applicant into the one acre out of LR No North Wanga/Mayoni/1926 by operation of law and the Respondent holds title of one acre out of LR No North Wanga/Mayoni/1926 in trust for the Applicant.
  - c. For an order that LR No North Wanga/Mayoni/1926 measuring 1.45 hectares or thereabouts be sub divided and a portion of 1 acre or 0.40 hectares thereof currently in occupation, possession and utilization of the Applicant be excised there from and a new number be issued and be registered in the names of the Applicant herein.



- d. That the Respondent herein be ordered to execute all the necessary documents to effect the subdivision and transfer of the one acre or 0.40 hectares of land currently in possession of the applicant out of LR No North Wanga/Mayoni/1926 in favour of the applicant herein, in default whereof the Deputy Registrar of this Honourable court be empowered to execute all such documents on behalf of the Respondent.
  - e. That the Respondent herein either by herself, her agents, servants and or employees be restrained by an order of an injunction from entering, trespassing, alienating, dealing and or interfering in any manner with the applicant's peaceful possession and occupation of one acre or 0.40 hectares out of LR No North Wanga/Mayoni/1926.
  - f. That the Respondent be condemned to bear the costs hereof.
  - g. Any other or further relief this Honourable court deems fit to grant.
2. The OS was supported by an affidavit sworn by the plaintiff. He deposed that on October 10, 1994, his father Hamisi Chebi Katimi purchased a portion of land measuring about one acre from a parcel of land known as North Wanga/954 from the late Ofutumbo Okereto who was the defendant's father. That soon thereafter, he (the plaintiff) started living on the said parcel with his father until the year 2004 when his father left him on the land and moved to another parcel. That subsequently the parcel North Wanga/954 was subdivided into two parcels being North Wanga/1127 and North Wanga/1128 and that his one-acre portion remained in North Wanga/1127.
  3. The plaintiff went on to state that on May 2, 2007, North Wanga/1127 was further subdivided into North Wanga/1926 and North Wanga/1927 after which the defendant registered herself as the proprietor of North Wanga/1926 measuring 1.45 hectares and in which the one-acre portion which he is claiming is located. That the one-acre portion is clearly demarcated on the ground and that he has erected a semi-permanent house where he lives with his wife and children. He added that he has been planting food crops on the portion from 1994 to the date of the affidavit.
  4. The defendant responded to the OS through a replying affidavit which she swore on February 24, 2021. She deposed that she is the registered owner of North Wanga/1926 and that the said parcel has no connection with North Wanga/954 or the agreement between Ofutumbo Okereto and Hamisi Chebi Katami. She added that the matter was determined in Mumias SPMCC No 410 of 2009 in which orders of eviction were given against Hamisi Chebi Katimi on August 2, 2011 and that the plaintiff had the opportunity to pursue his claim in ELC No 384 of 2014 (formerly HCCC No 19 of 2012 (OS)) which case the plaintiff withdrew only to later file the present case raising same issues. She urged the court to dismiss the OS with costs and to enter judgment in her favour for an order of eviction the plaintiff, his agents and anyone purporting to act for him from the parcel of land known as N/Wanga/Mayoni/1926 (the suit property), a permanent injunction against the plaintiff on the suit property, costs of the suit and the counter claim and any other relief that the court may deem just and fair to grant in relation to mesne profits.
  5. The hearing of the matter proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted her aforesaid affidavit as her evidence in chief. He further stated that he was 12 years old in 1994. That he filed but later withdrew Kakamega HCCC No 304 of 2014 and that the defendant herein had a case with his father being Mumias PMCC No 410 of 2009 which was concluded on August 2, 2011.
  6. The plaintiff's father Hamisi Chebi Katimi testified next as PW2. He stated that he purchased one acre of parcel number North Wanga/954 and that the parcel was subdivided several times resulting in the parcel of land known as N/Wanga/Mayoni/1926 (the suit property) where the one-acre portion is situated. That he was in occupation of the portion together with the plaintiff from 1994 to 2004



- when he relocated to another plot and that the defendant sued him in Mumias SRMCC No 410 of 2009 where she obtained an ex parte judgment and eviction orders against him. The plaintiff's case was then closed.
7. The defendant testified next as the sole defence witness. She adopted her aforesaid replying affidavit as her evidence in chief and added that Hamisi Chebi Katimi entered the land in the year 2004 and that when she filed Mumias PMCC No 410 of 2009, Hamisi was on the land with his younger wife and her child. That as at the date of her testimony, the plaintiff had two houses on the land and that her mother was also in occupation of the land. That the plaintiff entered the land in 2015 and constructed on it after Hamisi had vacated. The defence case was then closed.
  8. Parties thereafter filed and exchanged written submissions. I have carefully considered the pleadings, evidence, and the submissions. The issues that arise for determination are whether the plaintiff's suit is res judicata, whether adverse possession has been established and whether the reliefs sought should issue.
  9. Is the plaintiff's suit res judicata? Res judicata is a doctrine of general application which has found statutory expression in Section 7 of the *Civil Procedure Act* as follows:

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.
  10. The Supreme Court addressed the doctrine in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR* where it stated:

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
  11. For a plea of res judicata to succeed, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR*. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR*. While applying the doctrine, the courts must be vigilant against pleadings that are drafted so as to introduce what looks like a new cause of action, but which is in essence a mere cosmetic face-lift seeking the same remedy. See *Mwangi Njangu vs Meshack Mbogo Wambugu and Another, HCCC 2340 of 1991* (unreported).
  12. There is no dispute that the defendant herein filed Mumias PMCC No 410 of 2009 against Hamisi Katimi who is the plaintiff's father and that the case was concluded through decree dated August 2, 2011. In the said decree, an eviction order was issued against Hamisi Katimi in respect of the parcel of land known as North/Wanga/Mayoni/1926 which is the suit property herein. The plaintiff's case as well as his relationship with the suit property are intertwined. According to him, his father purchased



a one-acre portion of the suit property on October 10, 1994 as a result of which he started to live on the suit property with his father as a 12 year old boy until the year 2004 when he says his father left him on the land and moved to another parcel.

13. As Hamisi Katimi's son, the plaintiff herein is deemed to have litigated under Hamisi Katimi in Mumias PMCC No 410 of 2009 pursuant to explanation number 6 of Section 7 of the [Civil Procedure Act](#), more so considering that he entered the suit property as a child and stayed in it as a member of Hamisi Katimi's family. The suit concerned whether Hamisi Katimi could retain possession of the suit property, a question which the court resolved conclusively when it ordered his eviction. As we shall see below, a claim for adverse possession hinges on the claimant's occupation or possession of land. The court in Mumias PMCC No 410 of 2009 having come to a finding that Hamisi Katimi, and by extension the plaintiff herein as one of those claiming under him, had no right to retain possession of the suit property, this court cannot revisit the issue.
14. The plaintiff has argued that the proceedings in Mumias PMCC No 410 of 2009 were ex parte and that the decree is therefore not conclusive. That cannot be a valid argument since nothing has been availed to show that the decree was set aside through appeal or otherwise. A decree, even one of dismissal of a suit for want of prosecution, is a conclusive determination of the issues in the case if it is not set aside. See [Njue Ngai v Ephantus Njiru Ngai & another \[2016\] eKLR](#). I am satisfied that the plaintiff's suit is res judicata and is liable for striking out.
15. Even if I would not have found that plaintiff's suit is res judicata, the suit would still not succeed for failure to establish adverse possession, as I will now show.
16. The law and principles relating to adverse possession are well settled and are founded on Sections 7, 13, 17 and 38 of [Limitation of Actions Act](#). With those provisions in mind, the Court of Appeal observed in [Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another \[2015\] eKLR](#) as follows:

'From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been 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. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.'
17. Key requirements of adverse possession include that the claimant must demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The plaintiff needs to prove that the defendant has been dispossessed openly or willingly and that he has been in uninterrupted possession of the land for 12 years with an intention to own it. See [Kasongo & another v Ochieng & 2 others \(Civil Appeal 123 of 2017\) \[2022\] KECA 145 \(KLR\) \(11 February 2022\)](#) (Judgment).
18. In this case, the plaintiff entered the suit property as a dependant of his father. He has not shown any unequivocal personal intention to dispossess the defendant, beyond his father's entry and possession. Further, his stay in the property cannot be said to have been peaceful in the face of the decree in Mumias PMCC No 410 of 2009 which in essence required his father Hamisi Katimi and those litigating under



him to vacate the suit property with effect from August 2, 2011. I find that adverse possession has not been established.

19. The last issue for determination is whether the reliefs sought should issue. In view of the foregoing discourse, the plaintiff is clearly not entitled to the reliefs that he sought.
20. The defendant filed a counterclaim at paragraph 10 of her replying affidavit. She seeks eviction of the plaintiff and a permanent injunction. There is no dispute that the defendant is the registered owner of the parcel of land known as North/Wanga/Mayoni/1926 (the suit property). That much is conceded by the plaintiff and is manifest from the certified copy of the register which was produced. There is equally no dispute that the plaintiff is in occupation of a portion of the suit property. As a registered proprietor, the defendant is entitled to full enjoyment of her land and to the benefits accorded by Section 24 of the Land Registration Act as well as Article 40 of the Constitution. The defendant is in the circumstances entitled to vacant possession. Regarding the prayer for permanent injunction, I note that it does not state exactly what the plaintiff is to be restrained from. I am not persuaded that I should grant an injunction whose parameters are not defined. Doing so would only foment further disputes.
21. In the result, I make the following orders:
  - a. The plaintiff's (Musa Chebi Waiswa's) suit is struck out.
  - b. The plaintiff (Musa Chebi Waiswa), his agents and every person acting on his behalf to vacate from the parcel of land known as N/Wanga/Mayoni/1926 within 60 (sixty) days from the date of delivery of this judgment.
  - c. In default of compliance with b) above, the defendant shall be at liberty to evict the plaintiff (Musa Chebi Waiswa), his agents and every person acting on his behalf from the parcel of land known as N/Wanga/Mayoni/1926.
  - d. The defendant shall have costs of the suit and the counter claim.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JANUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Yegon holding brief for Mr Luchivya for the plaintiff

The defendant present

Court Assistant: E. Juma

