



**Atinga & another v Skylark Construction Limited & 2 others (Environment and Land Case Civil Suit 7 of 2020 & 292 of 2022 (Consolidated))
[2023] KEELC 15734 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT
7 OF 2020 & 292 OF 2022 (CONSOLIDATED)
SO OKONG'O, J
FEBRUARY 23, 2023**

BETWEEN

MBOGO AYOKI ATINGA PLAINTIFF

AND

SKYLARK CONSTRUCTION LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE CIVIL SUIT 292 OF 2022

BETWEEN

SKYLARK CONSTRUCTION LIMITED PLAINTIFF

AND

MBOGO AYOKI ATINGA DEFENDANT

JUDGMENT

1 The 1st Defendant in ELC No E7 of 2020 which is also the Plaintiff in ELC No 292 of 2022, Skylark Construction Limited (hereinafter referred to only as “Skylark”) filed a suit against Mbogo Ayoki Atinga (hereinafter referred to only as “Ayoki”) in the Chief Magistrates Court at Kisumu on 18th May 2018 in CMELC No 292 of 2018 which was subsequently transferred to this court and given a new case number ELC No292 of 2022 (hereinafter referred to only as “the civil suit”). In the civil suit, Skylark averred that it was at all material times the registered owner of all that parcel of land known



as LR No 21357, Kisumu Municipality (hereinafter referred to only as “the suit property”). Skylark averred that in April 2018 or thereabouts, Ayoki entered the suit property together with hired youths, destroyed a fence that it had started putting up around the property and carried away the building materials while threatening Skylark’s workers with physical injuries that forced them to abandon the exercise. Skylark sought judgment against Ayoki for;

1. An order of a permanent injunction restraining Ayoki from entering, encroaching, trespassing upon or interfering with Skylark’s user and enjoyment of the suit property.
 2. General damages for trespass.
 3. Costs of the suit.
- 2 Ayoki filed a defence and a counter-claim in the civil suit on 28th May 2018. Ayoki denied Skylark’s claim in its entirety. Ayoki denied that he trespassed on the suit property and destroyed Skylark’s fence and carried away its building materials. Ayoki averred that he and his family had been living on and using the suit property for over 60 years and that he had his home on the suit property. Ayoki averred further that he was also using the suit property for cultivation and cultural rites. Ayoki averred that he had been in open, continuous and uninterrupted occupation of the suit property for over 12 years and as such he had acquired the property by adverse possession. Ayoki averred that Skylark’s right to recover the suit property had been extinguished under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
- 3 In his counter-claim, Ayoki reiterated the contents of his statement of defence and sought judgment against Skylark for;
1. A declaration that Skylark’s right to recover the suit property was barred under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and that its title to the property was extinguished.
 2. An order that Ayoki had acquired title to the suit property by adverse possession having occupied the same for a period in excess of 12 years.
 3. An order that Ayoki be registered as the proprietor of the suit property in place of Skylark.
 4. An order that the Deputy Registrar of the court does execute all necessary documents to effect the transfer of the suit property to Ayoki in the event that Skylark refuses to do so.
 5. Costs of the suit.

While the civil suit was pending, Ayoki filed ELC No E7 of 2020(OS) on 16th October 2020 against Skylark and National Land Commission (hereinafter referred to only as “NLC”) by way of an Origination Summons dated 24th March 2020 (hereinafter referred to only as “the O.S”). In the OS,

Ayoki sought the determination of the following issues;

- 1 Whether Ayoki had been in occupation or had constructive possession of the suit property or part thereof with the knowledge or constructive knowledge of Skylark and NLC or any other persons or Government officials for a period of 12 years.
2. Whether Skylark and NLC had knowledge express or constructive at the time Skylark acquired the suit property of Ayoki’s interests and rights in the suit property and whether Skylark acquired the suit property subject to the overriding interest of Ayoki as provided under the *Land Registration Act*, 2012.



3. Whether Skylark acquired a valid title in respect of the suit property.
4. Whether Ayoki's patrilineal rights and interests in the suit property was extinguished by the Kenya Gazette Notice No 3400 of 1976 and if not, what are the legal implications of the notice.
5. Whether the Government of Kenya on behalf of Kisumu County Council compensated Ayoki and the direct lineage of his family in accordance with the said Gazette Notice.
6. Whether by virtue of the said the Gazette Notice, the Government of Kenya acquired the parcels of land set out in the notice on behalf of the then Kisumu County Council.

Ayoki sought judgment against Skylark and NLC for;

1. A declaration that Skylark's title to the suit property was illegally acquired and as such the same was invalid.
2. A declaration that NLC illegally and unprocedurally conferred an invalid title upon Skylark.
3. A declaration that Kenya Gazette Notice No 3400 of 1976 was never implemented.
4. A declaration that Ayoki's interest in the suit property overrides Skylark's interest in the property.
5. A declaration that Ayoki and his family were the bona fide owners of the suit property having acquired the same by adverse possession through prescription and that Skylark should transfer the same to him.
6. Costs of the suit.

- 4 The OS was brought on the grounds set out on the face thereof and on the affidavit of Ayoki sworn on 24th March 2020. Ayoki averred that his family and he had been in active uninterrupted occupation of the suit property for a period of over 70 years. Ayoki averred that his parents were never compensated by the Government of Kenya in accordance with the Kenya Gazette Notice No 3400 of 1976. Ayoki averred that his interest in the suit property was not terminated. Ayoki averred that the suit property was not available for allocation by NLC to Skylark and as such Skylark acquired an invalid and illegal title in respect thereof. Ayoki contended that Skylark had a personal relationship with the officers of NLC that led to the issuance of the illegal title.
- 5 In his affidavit in support of the application, Ayoki stated that the parcel of land where his homestead was situated among others was supposed to be acquired by the Government of Kenya on behalf of Kisumu County Council. Ayoki averred that following the publication of the Government's intention to acquire the said parcels of land in the Kenya Gazette, the town clerk of Kisumu Municipal Council forcefully evicted several people whose parcels of land were to be acquired. Ayoki averred that his family was not evicted. He averred that the said eviction exercise created open spaces that led to illegal land allocation in the area by the Commissioner of Lands which was succeeded by NLC. Ayoki stated that NLC and Skylark knew of his interest in the suit property when the same was allocated to Skylark and that his interest in the property overrides that of Skylark.
- 6 The OS was opposed by Skylark through a replying affidavit sworn by Jitendra Patel on 26th March 2021. Skylark averred that when it purchased the suit property and had the same transferred to its



name, the same was vacant. Skylark averred that Ayoki never resided on the suit property and that it was Skylark which had been in occupation of the property. Skylark averred that after purchasing the suit property, it fenced the same and that Ayoki used to sneak into the suit property at night to damage the said fence. Skylark averred that it reported Ayoki to the Police who arrested him but released him without a charge due to his age on his undertaking not to repeat the act. Skylark averred that after his release, Ayoki continued to enter the suit property at night to destroy the said fence a move that prompted Skylark to file a suit against him in the lower court (the civil suit). Skylark averred that it obtained an injunction in the civil suit restraining Ayoki from interfering with its occupation of the suit property. Skylark termed the OS an abuse of the process of the court.

Directions:

7 The OS and the civil suit were consolidated for hearing together with the OS as the lead file.

Ayoki's case:

8 At the trial, Ayoki adopted his affidavit in support of the OS as part of his evidence in chief. Ayoki told the court that he was born on the suit property in 1938 and that the suit property was family land where he lived with his parents. He stated that his parents were buried on the suit property. He stated that the land that he was claiming was not registered and that he did not know the reference number of the parcel of land claimed by Skylark. He stated that he used to till the land in dispute until he was sued by Skylark in the civil suit. He reiterated that as far as he was concerned, the land in dispute was not registered and had not been surveyed. He stated that prior to the filing of the civil suit, he had been cultivating the disputed parcel of land for several years. He stated that he tilled the land for 80 years. He produced the documents attached to his affidavit in support of the OS as exhibits.

9 On cross-examination, Ayoki stated that initially, he was living on the suit property with his father and that he left his father's homestead in 1975 and set up his own home a short distance from the suit property. Ayoki confirmed that the suit property was vacant. On examination by the court, Ayoki stated that he sued Skylark because it had encroached on his land.

Skylark's case:

10 Skylark called two (2) witnesses at the trial. Skylark's first witness was Jitendra Patel (DW1). DW1 adopted his witness statement that he filed in the OS as part of his evidence in chief and produced the bundle of documents filed by Skylark in the same matter as exhibits. DW1 also adopted the witness statement dated 17th May 2018 that he filed in the civil suit together with the plaint as part of his evidence in chief. DW1 also produced the bundle of documents that Skylark filed in the civil suit as additional exhibits. DW1 stated that Skylark purchased the suit property from one, Patrick Ochieng Ondong in 2017 and that the same was vacant. He denied that the suit property was being cultivated by Ayoki. He stated that a surveyor whom Skylark engaged to survey the suit property prepared a report that was filed in the civil case in which he concluded that the land was vacant and that the same was covered with shrubs.

11 On cross-examination, DW1 stated that Ayoki was cultivating the suit property before Skylark purchased the same. Upon examination by the court, DW1 stated that when Skylark purchased the suit property, the same was being cultivated by Ayoki and that he did not know in what capacity Ayoki was cultivating the suit property.

12 Skylark's second witness was Patrick Ochieng Ondong (DW2). DW2 corroborated DW1's evidence. He stated that he was the one who sold the suit property to Skylark. He stated that he purchased the suit property from one, Anthony Ondoche in 2011. He stated that the property was vacant when



he purchased it and that the property remained as such until the time he sold the same to Skylark. On cross-examination, DW2 stated that when he purchased the suit property, the same was not being cultivated by Ayoki.

National Land Commission's (NLC's) case:

- 13 NLC did not file a response to the OS in which it was sued as the 2nd Respondent. It did not therefore defend the suit.

The submissions by the parties:

Ayoki's submissions:

- 14 In his submissions filed on 17th January 2023, Ayoki framed two issues for determination namely; whether Ayoki was entitled to the reliefs sought in the OS and whether Skylark was entitled to the reliefs sought in the civil suit. Ayoki submitted that he inherited the suit property from his father and that he had occupied the same for over 80 years. Ayoki submitted that the suit property was supposed to be acquired compulsorily by the Government but the acquisition was not completed since he did not receive compensation for the land. Ayoki submitted that since he did not receive compensation, his right to the suit property was not extinguished and he remained the bona fide owner thereof. Ayoki submitted that although he moved out of the suit property to set up his homestead elsewhere, he continued to plough the suit property for over 60 years until Skylark attempted to dispossess him of the same. Ayoki submitted that Skylark found him cultivating the suit property when he purchased the same and that it did not bother to inquire from him of the interest that he had on the land. Ayoki submitted that he had acquired the suit property by adverse possession. Ayoki cited several authorities in support of his submissions. On whether Skylark was entitled to the reliefs sought in the civil suit, Ayoki reiterated that he was in possession of the suit property when Skylark purchased the same and as such the issue of him being a trespasser could not arise. Ayoki submitted further that Skylark did not produce any evidence of the alleged destruction of his fence or property. Ayoki submitted that the reliefs sought in his counter-claim in the civil suit and in the OS should be granted and that Skylark's claim in the civil suit should be dismissed.

Skylark's submissions:

- 15 Skylark filed its submissions on 19th January 2023 in which it also framed two issues for determination namely; whether Ayoki had proved his case to the required standard warranting the granting of the orders he has sought in the OS and who should bear the costs of the two suits. On the first issue, Skylark submitted that the burden was on Ayoki to prove that he had been in continuous possession of the suit property for 12 years or more and that the possession was open and notorious. Skylark submitted that in his evidence, Ayoki contradicted his pleadings. It submitted that in his pleadings, Ayoki claimed the suit property by adverse possession and gave its land reference number while in his evidence, he claimed that the suit property was not registered and had no title. Skylark submitted that Ayoki having admitted that he had vacated the suit property and set up his homestead elsewhere, he could not claim that he had continuous actual possession of the suit property. Skylark submitted that from the evidence tendered by Ayoki, it was difficult to determine whether Ayoki had been in possession of the suit property and for what period of time. Skylark submitted that DW2 testified that when he purchased the suit property, the same was vacant and that the property remained in that state until he sold the same to Skylark. Skylark submitted that this evidence was not controverted. Skylark submitted that Ayoki's adverse possession claim was not proved. Skylark submitted that Ayoki did



not even know the parcel of land which he was claiming by adverse possession. Skylark cited several authorities in support of its submissions. Skylark urged the court to dismiss Ayoki's claim with costs.

Analysis and determination of the issues arising:

16 I have two claims before the court. The first one is Ayoki's claim brought by way of Originating Summons (OS) seeking among other prayers, a declaration that he has acquired the suit property by adverse possession. The second suit is a civil suit (civil suit) brought by Skylark seeking among other reliefs, an injunction to restrain Ayoki from interfering with its use and enjoyment of the suit property. I will deal with the OS first because its determination will have a bearing on the civil suit.

Analysis and determination of Ayoki's adverse possession claim:

17 I have considered the OS together with the affidavit filed in support thereof. I have also considered the affidavit filed by Skylark in opposition to the application. Finally, I have considered the evidence tendered by the parties, the submissions by the advocates for the parties and the authorities that were cited in support thereof. As I have stated earlier in the judgment, in his OS, Ayoki has asked the court to determine several issues and has sought a number of reliefs. I am of the view that some of the issues raised for determination by Ayoki cannot be determined in a suit brought by way of an OS. In *Kibutiri v Kibutiri* [1983] eKLR, the court stated as follows:

“The procedure by way of originating summons is intended:

“to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.”

19 This was said in *Re Giles (2)* [1890] 43 Ch D 391, a decision cited with approval by this court's predecessor in *Kulsumbai v Abdulhussein* [1957] EA 699.

20 See also *Bhari v Khan* [1965] EA 94 in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.”

21 I am of the view that the issues and disputes arising from the compulsory acquisition by the Government of Kenya of what was referred to in Gazette Notice No 3400 dated 6th November 1976 as “The area presently unregistered Trust land situated generally to the north east and south of the old Kisumu Municipality, and as more particularly shown on the plans which may be seen at the offices of the District Commissioner, Kisumu and at the Department of Lands, Nairobi or obtained from the Commissioner of Lands...” are complex and contentious. It is no wonder that the NLC recommended the formation of a task force to look into the whole exercise. The said task force is yet to submit its report to the NLC. The issues arising from the said compulsory acquisition cannot therefore fall within the description of “simple matters” that can be determined through an Originating Summons. I am of the view that if Ayoki wanted the court to determine issues such as; whether the said compulsory acquisition exercise was completed and the land the subject thereof acquired by the Government of Kenya on behalf of Kisumu County Council, whether Ayoki and his family were compensated for their land and whether Ayoki and his family's interest in their land that was the subject of compulsory acquisition was extinguished, Ayoki should have filed a normal civil suit by way of a plaint. In that suit, Ayoki should have joined the Attorney General and Kisumu County Government as parties. All persons who are likely to be affected by the orders the court may make in relation to the said Gazette Notice No 3400 of 1976 should also be notified of such suit and made interested parties if necessary.



In his submissions, Ayoki did not submit on the reliefs that he had sought in relation to Gazette Notice No 3400 of 1976. He restricted himself to the claim for adverse possession. I will therefore determine only the issues relating to Ayoki's adverse possession claim. These are; whether Ayoki has acquired title to the suit property by adverse possession, whether Skylark should transfer the suit property to Ayoki and who is liable for the costs of the OS?

22 In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

In *Kimani Ruchine & another v Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, *nec vi, nec clam, nec plecario* (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”



23 In *Wambugu v Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

In *Githu v Ndeete* [1984] KLR 776 it was held that:

1. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”
2. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”

It is on the foregoing principles that Ayoki’s adverse possession claim falls for consideration. The burden was on Ayoki to establish the elements of adverse possession set out in the above cases. I am not satisfied from the evidence on record that Ayoki has proved that he has acquired the suit property by adverse possession. First, from his pleadings and evidence, Ayoki claims ownership of the suit property as of right. Ayoki has claimed that the suit property belonged to his grandfather and that he inherited the same from his father. Ayoki has claimed that the suit property has not been surveyed and that no title has been issued in respect thereof. All these allegations are inconsistent with an adverse possession claim. If indeed Ayoki is entitled to the suit property as of right, then he cannot claim the same by adverse possession. As correctly submitted by the advocate for Skylark, in his oral testimony, Ayoki appeared not to be even aware of the parcel of land that he was claiming through adverse possession. Ayoki claimed that the suit property had not been surveyed and no title had been issued while he referred to a specific parcel of land in his OS.

24 Secondly, I have noted that the title for the suit property came into existence on 16th August 2005 through Grant No I.R 99345 that was registered on 2nd November 2005 in favour of Anthony Oyier Ondoche. Several issues arise from this Grant in relation to Ayoki’s adverse possession claim. First, the land comprised in this Grant cannot be the one that Ayoki claims to have occupied for over 80 years (in some cases he talked of 60 years) since the title was not in existence prior to 2005. Ayoki could only be in adverse possession of the land as from 2nd November 2005 when the land was registered and the title came into existence. Prior to that date, the land belonged to the Government of Kenya against whom Ayoki could not claim adverse possession. Secondly, assuming that Ayoki was in possession of the suit property as at 2nd November 2005, as at that date, the property was owned by Anthony Oyier Ondoche. Anthony Oyier Ondoche transferred the suit property to Patrick Ochieng Ondong (DW2) on 28th December 2011. By the time the suit property was transferred to Patrick Ochieng Ondong, Ayoki’s adverse possession claim had not accrued against Anthony Oyier Ondoche and as such Patrick



Ochieng Ondong obtained a valid title free from Ayoki's adverse possession claim. For the purposes of adverse possession claim against Patrick Ochieng Ondong, time could only start running from 28th December 2011 when he acquired the suit property. Patrick Ochieng Ondong held the suit property from 28th December 2011 until 11th May 2017 when the property was transferred to Skylark. Again as at this date, Ayoki had not acquired the suit property by adverse possession as against Patrick Ochieng Ondong because 12 years had not lapsed from the time Patrick Ochieng Ondong acquired the property. This means that Skylark also acquired a valid title from Patrick Ochieng Ondong free from any accrued adverse interest. Ayoki's adverse possession claim against Skylark could only be brought 12 years from the date Skylark acquired the suit property unless Ayoki's adverse possession claim had crystalized as at the time Skylark acquired the property which is not the case. By the time Ayoki brought his adverse possession claim herein, it was barely 1 year from the time Skylark acquired the suit property and Skylark had asserted its right to the suit property by suing Ayoki in the lower court. Ayoki's adverse possession claim was therefore premature in the circumstances.

- 25 Assuming that I am wrong on the foregoing findings and that for the purposes of Ayoki's adverse possession claim, time is reckoned from 2nd November 2005 when the title to the suit property came into existence until 18th May 2018 when Ayoki was sued by Skylark changes in the ownership of the property during the period notwithstanding, I would still not find that Ayoki has acquired the suit property by adverse possession. From the evidence on record, I am satisfied that Ayoki was not in occupation of the suit property as at 2005. From his own testimony, he moved out of what is now said to be the suit property in 1975 and was using the property thereafter mainly for cultivation. There is no evidence that Ayoki was aware of the existence of Skylark's predecessors in title, Anthony Oyier Ondoche and Patrick Ochieng Ondong and of the fact that they held titles to the suit property. There is also no evidence that Skylark's said predecessors in title were aware of Ayoki's use of the suit property for cultivation. Ayoki cannot therefore be said to have been occupying the suit property with the intention of dispossessing Skylark's said predecessors in title of the suit property. Ayoki did not therefore acquire the suit property by adverse possession from Anthony Oyier Ondoche and Patrick Ochieng Ondong, Skylarks predecessors in title and likewise from Skylark.
- 26 Due to the foregoing, it is my finding that Ayoki's adverse possession claim has not been proved. The reliefs sought in the OS are therefore not for granting.
- 27 Analysis and determination of Skylark's claim and Ayoki's counter-claim in the civil suit:
- 28 Skylark sued Ayoki in the civil suit for trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass. Skylark has proved that it is the registered owner of the suit property. Skylark has produced in evidence a copy of its title for the suit property showing that it was registered as the owner of the suit property on 11th May 2017.
- 29 The suit property was registered under the *Registration of Titles Act*, Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained



therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

30 Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 that repealed the Registration of Titles Act provides 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.

(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.

31 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.”



- 32 Skylark having proved its ownership of the suit property and Ayoki's entry thereon, the onus was upon Ayoki to justify his entry and use of the suit property. In his defence, Ayoki denied that he trespassed on the suit property. Ayoki claimed that he had lived on the suit property with his family for over 60 years and that he had his home on the property. Ayoki claimed that having occupied the suit property for over 12 years, he had acquired the same by adverse possession. The court has already dealt with Ayoki's adverse possession claim and found the same to have no merit.
- 33 With the collapse of Ayoki's adverse possession claim which was also the basis of his defence and counter-claim in the civil suit, this court finds no valid reason for Ayoki's entry and use of the suit property. Ayoki has failed to put forward any justifiable cause for entering and using the suit property. It is my finding that Ayoki is a trespasser on the suit property. For the foregoing reasons, I am satisfied that Skylark has proved its claim against Ayoki to the required standard. Skylark is therefore entitled to the injunction sought in the civil suit against Ayoki. Skylark did not make any submissions on general damages. I will not award the same. I will not consider Ayoki's counter-claim based on adverse possession. I have dealt with the same in the OS where I found the claim to be without merit.

Who is liable for the costs of the OS and the civil suit?

- 34 Having determined both parties' claims, what remains is the issue of costs. Under section 27 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. As a general rule, costs follow the event unless the court for good cause orders otherwise. In the present case, Skylark has succeeded in its claim against Ayoki. Ayoki has failed in his OS and counter-claim in the civil suit. There is no reason why Skylark should be denied the costs of the two suits. Skylark shall have the costs of the suits.

Conclusion:

- 35 In conclusion, I hereby make the following orders in the consolidated suits;
1. The Originating Summons dated 24th March 2020 by Mbogo Ayoki Atinga is dismissed.
 2. The counter-claim dated 28th May 2018 by Mbogo Ayoki Atinga is dismissed.
 3. A permanent injunction is issued restraining Mbogo Ayoki Atinga from entering, encroaching, trespassing upon or interfering with Skylark Construction Limited's user and enjoyment of all that parcel of land known as LR No 21357 Grant No I.R 99345, Kisumu Municipality.
 4. Skylark Construction shall have the costs of the Originating Summons (ELC No E7 of 2020 OS) and the civil suit (ELC No 292 of 2022) to be paid by Mbogo Ayoki Atinga.

DATED AND DELIVERED AT KISUMU ON THIS 23RD DAY of FEBRUARY 2023

S. OKONG'O

JUDGE

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

Mr. Yogo for Skylark

N/A for Ayoki

N/A for NLC

Ms. J.Omondi-Court Assistant

