



**Akuku v Ondoro (Environment & Land Case 54 of 2021)
[2023] KEELC 15708 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 54 OF 2021
GMA ONGONDO, J
FEBRUARY 22, 2023**

BETWEEN

DAVID DACHI AKUKU PLAINTIFF

AND

JANE AKETCH ONDORO DEFENDANT

JUDGMENT

A. Introduction

1. The central property in the present suit is land reference under central Kasipul/Kachien/215 measuring approximately zero decimal one three hectares (0.13 Ha) in area (the suit land herein). The same is captured in registry map sheet number 23 and located within Homa-Bay county.
2. The suit land is a subdivision of land reference number Central Kasipul/Kachien/99 (the parent land herein)
3. The plaintiff, David Dachi Akuku is represented by the firm of G.S Okoth and Company Advocates further to a notice of change of advocate dated April 20, 2021 and duly filed in court on May 20, 2021.
4. The defendant, Jane Akech Ondoro is represented by the firm of Aluoch Odera Nyauke and Company Advocates pursuant to a notice of advocates dated July 2, 2022 and filed herein on October 17, 2022.
5. On July 18, 2022, the court gave directions inter alia;

“.... Originating submissions dated November 26, 2018 and replying affidavit sworn on October 8, 2019 be treated as plaint and statement of defence respectively.....

...Hearing be by viva voce evidence.....”



6. Initially, this suit was lodged at Migori in Environment and Land Court. On October 18, 2021, the same was transferred to this court for hearing and determination.

B. The plaintiff's case.

7. The instant suit was mounted by the plaintiff on behalf of the estate of his father Abel Akuku Oduwo(deceased-A) who allegedly owned and occupied the suit land being part of the estate of Orao Orimba (deceased B). That it is currently registered in the name of the defendant by fraud. That in 1970's deceased -A was settled on the suit land by deceased -B. That the family of deceased A including the plaintiff have possessed and occupied the suit land from 1970's to date.
8. The plaintiff claims that in 2015, he discovered the defendant's fraudulent registration of the suit land in her name. That she initiated a criminal case against him at Oyugis Law courts. Further, that the defendant is keen to evict the plaintiff and family out of the suit land after she filed Oyugis Principal Magistrate's Court civil case No 83 of 2015 against him and judgment was rendered in her favour.
9. In that regard, by an originating summons dated November 26, 2018 and filed herein on November 30, 2018, the plaintiff is seeking determination of the following issues;
 - a) Whether the suit land currently registered in the names of Jnae Aketch Ondoro is part of the settlement land central Kasipul/Kachien/99 allocated to the deceased A.
 - b) Whether the registered owner was lawfully given the suit land as a gift by deceased B as alleged.
 - c) Whether the family of deceased A have since 1971 to date cultivated, possessed the suit land and if so for how long have they occupied the same.
 - d) Whether the registered proprietor defendant has ever occupied, cultivated or used the suit land in any way since 1970's or thereabout.
 - e) Whether the registration of the defendant as proprietor of the suit land was done frequently or openly and whether any other person has asserted his right of ownership over the said land at all.
 - f) If the answer to 3 above is positive, whether the said occupation and possession has been peaceful, continuous, uninterrupted and open for a period of more than 12 years or not.
 - g) Whether the estate of deceased A or any of his kinsmen occupying the suit land have acquired title to the suit land by way of adverse possession.
 - h) Whether there was a succession cause in respect to deceased –B the original owner filed in any court of law by the defendant before issuance of title herein.
 - i) Who is to bear the costs of this suit.
10. In his evidence, the plaintiff (PW1) relied on his supporting affidavit in respect of the originating summons as part of her evidence.

Also, he relied on his list of documents dated November 26, 2018 serial numbers 3 to 9 (P Exhibits 1 to 7 respectively). He claims that he has acquired title to the suit land by way of adverse possession.
11. PW2, Moses Odhiambo Akoko,a step brother to PW2, relied on his statement dated September 16, 2022 as part of his evidence. He stated, inter alia, that the suit land is registered in the name of the defendant.



C. The Defendant's Case

12. By a replying affidavit of ten (10) paragraphs sworn on October 8, 2019, the defendant opposed the originating summons. She relied on documents marked as "JAO1" to "JA03" (D EXhbts 1 to 3) annexed to the affidavit.
13. The defendant (DW1) told the court that PW1 does not cultivate the suit land which belongs to her. That there was no person who was cultivating the same in 1980's when she started cultivating it. That she uses the suit land since the delivery of the Judgment in Oyugis Principal Magistrate's Court Civil Case No. 83 of 2015 (DExhbt 1) and further relied on certificate of costs (D Exhibit 3) contained in further list of documents dated October 11, 2022 serial Nos. 1 and 2 respectively.
14. DW2, Joseph Orimba Onyango testified that DW1 was his sister in law. He relied on his statement of defence dated July 22, 2022 as part of his testimony.
15. DW3 was Yusuf Odero Oduo, a neighbor to DW1. He stated that DW1 was his sister in law and relied on his statement dated July 22, 2022 as part of his evidence.
16. By submissions dated November 4, 2022 and filed in court on November 9, 2022, learned counsel for the plaintiff referred to the parties' respective pleadings and evidence in this case. Counsel implored the court to find that the plaintiff has acquired the suit land by adverse possession and relied on applicable law including *Black's Law Dictionary* 9th Edition at page 62, Halsburry's Laws of England, 4th Edition volume 28 at paragraph 977, sections 7 and 13 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, *Wambugu v Njuguna* [1983] eKLR 172 and *Maweu v Liu Ranching and Farming Cooperative Society* [1985] eKLR, among other authorities, to buttress the submissions.
17. In the defendant's submissions dated November 15, 2022, reference was made to the parties' respective pleadings, evidence and framed three issues for determination including whether the plaintiff deserves the orders he is seeking, therein. Counsel termed the suit as an afterthought filed after the plaintiff lost Oyugi's Principal Magistrate's Court Civil Suit No. 23 of 2015. That it is only meant to delay and or evade execution of the decree thereof. Counsel cited the case of *Abdirashid Adan Hassan v Estate of Wheedgley* [2022] eKLR, among others, and urged the court to dismiss the suit with costs to the defendant.
18. I have thoroughly studied the entire pleadings, evidence and submissions of the respective parties in this suit. So, the issues for determination are condensed to;
 - a. Does the plaintiff deserve the orders sought in the originating summons?
 - b. Depending on the outcome in issue (a) herein above, what are the final orders herein to meet the ends of justice?
19. Paragraph 9 of the originating summons states that:

“(9)...Jane Ondoro Akech in a bid to evict my family out of the suit land filed civil suit No. 83 of 2015 at Oyugis Law Courts and Judgment recently made in her favour....”
20. The defendant's replying affidavit at paragraph 8 reads:
 - (8)That in that event, I have had service of court cases with the plaintiff herein and as such he cannot claim to have had quiet suit parcel of land....”



21. It must be noted that PExhibit 7 is the same as D Exhibit 1 as per the evidence of PW1 and DW1 respectively.
22. The defendant’s counsel submitted in part that:
“.....this suit by the plaintiff knowing well the matter against this parcel had been litigated to its conclusion...”
23. On that score, the defendant’s counsel has raised a preliminary objection to the suit. The same is on a point of law, res judicata.
24. In the case of *Mukisia Biscuits Manufacturing Company Limited v West End Distributors Company Limited* [1969] EA 696, the Court of Appeal held:
“..... A preliminary objection consists of a point of law..... Examples are a submission.....”
25. In *Black’s Law Dictionary*, 10th Edition at page 1504, the term “Res Judicata” means;
“An issue that has been definitely settled by judicial decision.”
26. The dictionary proceeds to set out the elements of “*Res Judicata*” thus;
 - a. An earlier decision on the issue
 - b. A final judgment on the merits.
 - c. The involvement of the same parties, or parties in privity with the original parties
27. Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya stipulates res judicata principle. I take into account the key ingredients of the same.
28. By P Exhibit 7 and D Exhibit 1, this suit is barred by the principle of res judicata under section 7 of the *Civil Procedure Act*, (supra).
29. The cardinal principle is that litigation has to come to an end; see *Halsbury’s Laws of England* (4th Edition) volume 22 page 273.
30. Similarly, I endorse the reasoning of Obaga J in the case of *Eunice Wangui Muturi v Francis Kamande and another* [2017] eKLR that:
“..... public policy demands that litigation has to come to an end.....”
31. In conclusion, I find that this suit is res-judicata. So, the plaintiff does not deserve the orders sought in the originating summons.
32. Accordingly, this suit is hereby dismissed.
33. On costs, the *Halsbury’s Law of England* 4th Edition volume 10 states in part:
“the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised Judicially”
34. By dint of the proviso of section 27(1) of the *Civil Procedure Act* (supra), costs follow the event within judicial discretion; see also *Rai v Rai and others* [2014] eKLR.
35. Costs of this suit shall be borne by the plaintiff.



36. Orders accordingly.

DELIVERED AND DATED AT HOMABAY THIS 22ND DAY OF FEBRUARY 2023

G.M.A ONG'ONDO

JUDGE

PRESENT:

Plaintiff, present

Defendant, present

Ms. P. Odhiambo, holding brief for G.S Okoth, learned counsel for plaintiff.

Mr. S. Nyauke, learned counsel, for the defendant.

