



REPUBLIC OF KENYA



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**Ogora & 3 others v Mwita (Environment & Land Case 143 of 2017)
[2023] KEELC 15683 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 143 OF 2017
MN KULLOW, J
FEBRUARY 13, 2023
(FORMERLY KISII ELC CASE NO. 58 OF 2012)**

BETWEEN

**PETER MWITA OGORA 1ST PLAINTIFF
SIMION MANYENGO OGOORA 2ND PLAINTIFF
JOSEPH CHACHA OGOORA 3RD PLAINTIFF
ELIZABETH MUGAYA MARACHANI 4TH PLAINTIFF**

AND

MUNIKO MWITA DEFENDANT

JUDGMENT

1. This Judgment relates to two suits; Migori ELC Case No. 143 of 2017 and Kisii ELC Case No. 400 of 2013 (O.S) which were consolidated by Consent. It was further agreed that the instant suit No. 143 of 2017 would be the lead file. For purposes of this judgment, the plaintiffs in 143/2017 shall be the Plaintiffs while in 400/2013 he shall be the Plaintiffs/ Respondents and the Defendant shall be the Defendant/ Applicant.
2. The Plaintiff commenced this suit by way of a Plaint dated 16.02.2012; seeking the following Orders: -
 - i. An Order of eviction evicting the Defendant, his agents and/or servants from the deceased's parcel of land NO. Nyabasi/ Busonga/ 196.
 - ii. Costs of this suit.
 - iii. Any other or further order as the Court may deem fit to grant.



Plaintiffs' Case

3. The Plaintiff, who are the Administrators of the estate of the late Ogoora Chacha, avers that the late Ogoora Chacha is absolute registered proprietor of the suit parcel No. Nyabasi/Busonga/ 196. However, the Defendant without authority or consent trespassed and/or forcefully entered into the deceased's parcel and has illegally retained a portion measuring 4Ha.
4. It is their claim that the Defendant has forcefully retained their rightful portion of land and thus urged the court to issue an Order of eviction and permanent injunction against the Defendant; restraining him from re-entering and/or interfering with the suit parcel in any way.
5. During trial, the 1st Plaintiff testified as PW1. He adopted his witness statement dated 19/11/2019 as his evidence in chief. He further stated that the suit land was originally jointly owned by his father Ogoora Chacha and Nyagetari Chacha before the same was subdivided into 2 parcels No. Nyabasi/Busonga/154 and 196; owned by the Defendant and their deceased father respectively. He produced the documents on his list of documents dated 16/2/2012 as Pexh 1 and 2 in further support of his case.
6. On cross-examination he conceded that Pexh 1 showed that they had instituted the suit in their own capacity even though they are not the registered owners of the suit parcel whereas Pexh 2 showed that the late Ogoora Chacha was the registered owner of parcel No. Nyabasi/ Busonga/196.
7. He further maintained that their claim against the Defendant was on trespass; that the defendant entered into a portion of the suit land measuring 4 acres sometimes in the year 2010, he has built a house and planted coffee and trees thereon. On re-examination he clarified that they had filed the suit as the administrators of the estate of the late Ogoora Chacha.
8. Joseph Chacha Ogoora was sworn as PW2 but was however stood down before testifying. Wankio Mwita Gibayi testified as PW3; he adopted his witness statement dated 14/11/2019 as his evidence in chief. On cross –examination he stated that the plaintiffs and defendant have had a long-standing dispute over the suit parcel for several years. He however conceded that the defendant had lived and used the suit land for cultivation for many years.
9. Peter Mwita Bosara testified PW4; he adopted his witness statement as his evidence in chief. On cross-examination, he stated that the Defendant encroached into a portion of the suit parcel which is registered in the name of 1st Plaintiff's father. He further confirmed that the Defendant is registered as the owner of parcel No. Nyabasi/ Busonga/154 and not No. 196. The Plaintiff thereafter closed his case.

Defendant's Case

10. The Defendant filed a Statement of Defence dated 12/03/2012, wherein he denied all the allegations raised by the Plaintiffs. He further stated that there has never been any trespass/ encroachment on his part. That the suit parcel shares a common boundary with his lawful parcel No. 154 and there has been no interference whatsoever.
11. It was his contention that the 2 land parcels are distinctly separated by an access road which was mutually established by the 2 parties and has been in existence since the year 1972 to date. He thus maintained that the orders of eviction sought against him are misconceived and legally untenable for the reason that he has neither entered nor occupied any portion of the suit land. He urged the court to dismiss the suit with costs.



12. On 07/03/2022 the matter proceeded for Defence Hearing. James Chacha Muniko, the son of the Defendant and holder of Power of Attorney testified as DW1 on behalf of his father. It was his testimony that the Plaintiffs' own parcel No. 196 while they own parcel NO. 154. He denied the allegations of trespass and/or encroachment made by the plaintiffs and maintained that they had lived on the suit parcel for over 70 years. He also stated that the boundary between parcel Nos. 154 and 196 is well demarcated on the ground.
13. He produced the following documents as exhibits; copy of the Power of Attorney as DW1, copy of the Title Deed dated 11.11.1974 as DW2, Certificate of Search dated 29.02.2012 as DW3, copy of the Green Card as DW4, RIM as DW5, Letter from Vohra & Vohra Advocates dated 21.02.1972 as DW6, Letter dated 18.04.1972 as DW7, Advocate's letter to the Registrar Homabay as DW8 and letter dated 18/05/1972 as DW9 in further support of his claim.
14. On cross- examination he stated that, his father became the registered owner of parcel No. 154 during the demarcation process. He however conceded that the Surveyors Report confirmed that they had encroached onto the suit land for a portion measuring approx. 4 Acres. He further conceded that they only filed a claim Originating Summons against the Plaintiffs after the boundary had been determined and fixed.
15. On re-examination, DW1 stated that they had been living on the suit land for over 70 years and maintained that the 4 acres belonged to them.
16. Joseph Musuma Gekura testified as DW2; he adopted his witness statement as his evidence in chief. He further stated the Defendant owned parcel No. 154 while the Plaintiffs owned parcel No. 196 and that the two parcels of land were clearly separated by a path.
17. On cross-examination; he reiterated that the two parcel are separated by an access path. He maintained that both parties had lived on their separate parcels of land.
18. Richard Sarara Marego testified as DW3; he adopted his witness statement as his evidence in chief. He further stated that both the Plaintiff and the Defendant had their separate parcels of land No. 196 and 154 which was separated by a path.
19. On cross-examination he stated that before subdivision of the 2 parcels No. 154 and 196; the land was owned by the Ogoora Family. He conceded that he did not know where the boundary between the 2 parcels was and denied knowing whether the boundary had been determined or the report by the surveyor thereof. The Defence thereafter closed their case.
20. This suit was consolidated with Kisii ELC Case No. 400 of 2013 (O.S) wherein the Defendant/ Applicant filed a suit vide an Originating Summons dated 30/09/2013 against the Plaintiffs/ Respondents herein seeking the following orders: -
 - i. A Declaration that the Defendants right to recover a portion measuring 4 Acres of L.R. No. Nyabasi/ Busonga/ 196 (belonging to and registered in the name of the Ogoora Chacha, now deceased) is barred under the Limitations of Actions Act, Cap 22 and his title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 60 years.
 - ii. There be an Order that the Plaintiff be registered as the proprietor of the portion measuring 4 Acres of L.R. No. Nyabasi/ Busonga/ 196, in place of the deceased.



- iii. There be an Order restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion measuring 4 Acres of the suit land, that is L.R. No. Nyabasi/ Busonga/ 196, in any manner whatsoever and/or howsoever.
 - iv. The Deputy Registrar and/or Executive Officer of the Honourable High Court be directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of the portion measuring 4 Acres of L.R. No. Nyabasi/ Busonga/ 196, in favor of the Plaintiff.
 - v. Costs of the Originating Summons be borne by the Defendants.
 - vi. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
21. The Defendant's claim in the said suit was basically a claim of adverse possession; it was his contention that a portion measuring 4 Acres of parcel No. 154 was excised and included in the defendant's portion No. 196. However, despite the inclusion of the said portion to parcel No. 196; he continued to occupy and utilize the disputed portion to date for a period of over 60 years. He maintained that no precipitate action has been taken/ commenced to recover the disputed portion of land by the late Ogoora Chacha who is the registered owner or his family.
 22. The Plaintiff herein (Respondent) filed a Replying Affidavit sworn on 27/11/2013 by the 1st Plaintiff on his own behalf and on behalf of the other Plaintiffs herein. In response to the claims by the Defendant/ Applicant that a portion of his land No. 154 was excised and included in parcel No. 196; he averred that the Defendant never filed any objections in accordance with the Land Adjudication Act, to protest that part of his land had been incorporated in parcel No. 196 and registered in the name of the late Ogoora Chacha.
 23. It was his position that the Defendant/ Applicant had encroached into the disputed portion, hence the need for an eviction order and relied on the Land Registrar and Surveyor's Report dated 12/09/2013 in support of the said averments. The said Report confirmed that the Defendant had encroached into their portion measuring 4 Acres of parcel No. 196. They thus urged the court to dismiss the Defendant's (Plaintiff's) claim of adverse possession.
 24. Vide an Order dated 16/07/2013; Okong'o J. directed the District Land Registrar and District Surveyor – Kuria District to visit the 2 parcels Nos. Nyabasi/ Busonga/196 & 154 for purposes of determining and fixing the boundary between the 2 parcels and to establish whether there has been any encroachment in any of the 2 parcels and by who. He thereafter directed that a Report be filed by the Land Registrar and Surveyor within 60 days from the date thereof.
 25. Pursuant to the Order of 16/07/2013; the Land Registrar and the Surveyor visited the 2 parcels and filed a Report dated 12/09/2013. The said report found that there was encroachment into parcel No. Nyabasi/ Busonga/ 196 by the Proprietor of parcel No. Nyabasi/Busonga/154.
 26. Upon close of the Defence Case, I directed the parties to file their final written submissions. Both parties filed their rival submissions together with authorities, which I have considered and taken into account in arriving at my decision as hereunder;



Analysis And Determination

27. I have duly considered the pleadings filed herein, the evidence tendered in court, the testimony of the parties and their witnesses and the submissions in totality; it is therefore my considered view that the following issues arise for determination: -
- a. Whether the Plaintiffs have proved their claim of trespass/ encroachment by the Defendant onto the suit parcel No. Nyabasi/ Busonga/196.
 - b. Whether the Defendant/Applicant has proved his claim of adverse possession as raised in the Originating Summons dated 30/09/2013
 - c. Whether the Plaintiffs are entitled to the reliefs in the Plaint dated 06/02/2012.

A. Whether the Plaintiffs have proved their claim of trespass/ encroachment by the Defendant onto the suit parcel No. Nyabasi/ Busonga/ 196

28. The ownership of the 2 parcels of land herein; L.R. No. Nyabasi/ Busonga/196 and Nyabasi/ Busonga/ 154 is not in dispute. The Plaintiffs' deceased father is the registered owner of the suit parcel No. 196 while the Defendant is the registered owner of parcel No. 154. The Plaintiff however claims that sometimes in the year 2010; the Defendant without any color of right trespassed into a portion of their property measuring 4 Acres and has remained thereon todate.
29. The Defendant, DW2 and DW3 all denied any claims of trespass and/or encroachment and maintained that both parties lived on their separate parcels of land, distinctly separated by clear boundaries and an access path. DW1 denied entering or occupying any portion of the suit land and urged the court to dismiss the trespass claim against him with costs.
30. The boundary between the 2 parcels No. 196 and 154 appears to be in dispute; the Plaintiff and his witnesses maintained that there was no clear boundary between the two parcels of land whereas DW1 and his witnesses maintained that there was a distinct boundary between the said parcels. Section 18(2) of the [Land Registration Act](#) ousts the jurisdiction of the court in entertaining and determining any action or proceedings relating to a dispute as to the boundaries of a registered land and vests the requisite jurisdiction of determining and fixing boundaries of the same solely on the Land Registrar.
31. In order to ascertain the said claims of trespass and/or encroachment; this court issued an Order dated 16/07/2013 directed to the Land Registrar and the Surveyor; to visit the said parcels for purposes of determining and fixing the boundary thereof and to further ascertain whether there was encroachment and by whom. The same was done and a Report was duly filed to that effect.
32. The said Land Registrar and Surveyor's Report dated 13/09/2013 read in part as follows;
- “..after the survey exercise, it was established that there is a big encroachment into parcel No. 196 by the proprietor of parcel No. 154 (Muniko Mwita- Defendant). The Proprietor of parcel No. 154 is carrying out farming activities and even erected structures on some sections of parcel No. 196. We fixed the common boundary as per the maps, ordered the concerned parties to plant sisal plants along the common boundary and asked all parties to respect and maintain features demarcating this common boundary.”



33. Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

34. I wish to associate myself with the findings and conclusions arrived at by the Land Registrar and the Surveyor in their Report dated 12/09/2013 in finding that the Defendant has encroached onto the Plaintiffs suit parcel and consequently the Plaintiffs have sufficiently proved their claim on trespass.

B. Whether the Defendant/Applicant has proved his claim of adverse possession as raised in the Originating Summons dated 30/09/2013

35. The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have severally been discussed by the courts. The legal framework for adverse possession is provided for in various statutory provisions to wit; Sections 7,13, 17 and 38 (1) and (2) of the Limitation of Actions Act and Section 28 (h) of the Land Registration Act.

36. The Defendant/ Applicant claims that he is entitled to a portion of the suit parcel L.R. No 196 measuring 4 Acres; having been in open, peaceful, uninterrupted and continuous possession and occupation of the said portion for a period of 60 years. He further claims that the Plaintiffs right over the same portion has since extinguished upon the expiry of the 12 years' statutory period.

37. The Plaintiffs/ Respondents on the other hand denied the claims of Adverse Possession as raised by the Defendant and maintained that he had encroached into a portion of their rightful property; they relied on the Land Registrar & Surveyor's Report dated 13/9/2013, which confirmed the said averments. They further stated that no objection proceedings were filed by the Defendant/ Applicant to ventilate his claim in the appropriate forum.

38. The Court of Appeal in Kisumu Civ. App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following: -

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued
- (e) That the possession was open and undisturbed for the requisite 12 years.

39. I have critically looked at the pleadings and the testimony of the parties and their witnesses in the case. At paragraph 5 and 6 of the Supporting Affidavit; the Defendant claims that the portion in dispute herein measuring 4 Acres was his rightful share. However, during Adjudication and demarcation process, the said portion was excised and included into the suit land. Further, DW2 and DW3 in their testimony stated that the 2 parcel Nos. 154 and 196 were separated by an access road and that both parties lived on their rightful parcels. From the foregoing, it is clear that the Defendant claims to be the rightful owner of the land in question, he has not acknowledged the rightful ownership of the registered owner of the land Ogoora Chacha.



40. The Defendant/ Applicant's claim is that he has occupied a portion of the suit land for a period of 60 years and that the deceased and/or the Plaintiffs/ Respondents never commenced any precipitate action aimed at evicting him from the said parcel, it is trite law that long possession is not necessarily adverse possession.
41. I am further guided by the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ. No. 283 of 1990 *Gabriel Mbuvi v Mukindia Maranya* [1993] eKLR, where the Court held: -
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
42. Accordingly, it is my considered opinion that the Defendant has not demonstrated when his possession and occupation became adverse and when time started running for adverse possession. It is not clear whether the same was after the adjudication and demarcation process, whether it was in the year 2010 when the trespass and/or encroachment occurred or the same was in the year 2013 when the Land Registrar and Surveyor's Report was filed confirming the said trespass.
43. Further, it was the testimony of PW1 and PW2 that there was no clear boundary separating the two parcels of land and that parties were freely using the said land; the same was buttressed by the Land Registrar's Report. One can therefore imply from the above that the Defendant/ Applicant's use and occupation of the disputed portion measuring 4 Acres was on the pretext that he was using his own piece of land and the said use cannot be translated to mean an assertion of his rights with the aim of dispossessing the Plaintiffs of their rightful share. It is therefore my considered opinion that a claim of adverse possession cannot arise/ accrue in the circumstances.
44. I also wish to point out that the said claim for Adverse Possession was raised soon after the Report by the Land Registrar and the Surveyor dated 13/09/2013 was filed and whose effect was to find that the Defendant had encroached into a portion of the suit parcel; this is despite the fact that in his Defence and witness statement he has maintained that he occupies and uses his registered land parcel L.R. No. 154. The filing of this claim is therefore an afterthought in my view.
45. The totality of the foregoing is that the Defendant/Applicant's claim on Adverse Possession is not merited and the Originating Summons dated 30th September, 2013 is hereby dismissed with costs.

C. Whether the Plaintiffs are entitled to the reliefs in the Plaint dated 06/02/2012

46. The Plaintiffs have sought an Order of Eviction against the Defendant from the disputed 4 Acres.
47. Having held that they have satisfactorily proved their claim of trespass against the Defendant; I accordingly find that they are entitled to the reliefs sought. The deceased being the registered owner of the suit parcel No. 196; I find that the beneficiaries to his estate are entitled to all the rights and privileges appurtenant thereto by virtue of being the proprietor and is thus entitled to the occupation and use of the said land without interference from the Defendant or anyone.

Costs

48. Costs generally follow the event; in this instant case, having held that the Plaintiffs have sufficiently proved their claim on Trespass, I find that they are entitled to costs of the suit.



Conclusion

49. The upshot of the above is that the Plaintiffs have proved their case to the required threshold and I accordingly allow the Plaintiffs' claim dated 06/02/2012 and enter judgement for the Plaintiffs against the Defendant on the following terms: -
- i. The Defendant's claim of Adverse Possession is hereby dismissed.
 - ii. The Defendant, his agents, servants, employees and anyone claiming through him, are hereby Ordered to vacate a portion of the suit property L.R. No. Nyabasi/Busonga/ 196 measuring 4 Acres within 90 days from the date of this Judgment and in default he be forcefully evicted.
 - iii. An Order of Eviction be and is hereby issued evicting the Defendant, his agents and/or servants from the deceased's parcel of land No. Nyabasi/Busonga/ 196. Any Eviction must strictly comply with the provisions of section 152E of the *Land Act*.
 - iv. Costs of the suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Mr. Amuga for the Plaintiffs

Nonappearance for the Defendant

Court Assistant - Tom Maurice/ Victor

