



Olang & another v Obuya (Sued as the Legal Administrators of the Estate of Abuya Juma - Deceased) (Environment & Land Case 13 of 2021) [2022] KEELC 13633 (KLR) (18 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 13 OF 2021
GMA ONGONDO, J
OCTOBER 18, 2022**

BETWEEN

OMULO JARED OLANG 1ST PLAINTIFF

MARGRET ADHIAMBO ODHIAMBO 2ND PLAINTIFF

AND

MAURICE OTUNGA OBUYA (SUED AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF ABUYA JUMA - DECEASED) DEFENDANT

JUDGMENT

A. Introduction

1. The instant suit revolves around land reference number West Kasipul/KK/89 measuring approximately zero decimal three seven hectares (0.37 Ha) in area. The same is captured in Registry Map Sheet number 24 and located within Homa Bay County.
2. The two plaintiffs are represented by the firm of Oguttu Mboya, Ochwal and Partners Advocates, formerly, Messrs Oguttu, Ochwangi, Ochwal and Company Advocates.
3. The defendant, Maurice Otunga Obuya is represented by the firm of Odondi Awino and Company Advocates.
4. On July 23, 2019, the court directed, *inter alia*, that the suit be heard by way of viva voce evidence.
5. Initially, the suit was lodged at Migori Environment and Land Court but the same was transferred to this court with effect from September 28, 2021 as envisioned under Articles 6 (3) and 48 of the [*Constitution of Kenya, 2010*](#).



B. The plaintiffs' case

6. By an originating summons dated June 25, 2018 and filed in court on July 11, 2018 under Order 37 Rules 7 and 14 of the [Civil Procedure Rules, 2010](#) and section 38 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya, the plaintiffs claim to have acquired title of the suit land by way of adverse possession for determination of the following questions;
 1. Declaration that the defendant's rights to recover the whole of the suit land is barred under the [Limitations of Actions Act](#), chapter 22 of Laws of Kenya, and his Title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period of 15 years.
 2. There be an Order that the plaintiffs be registered as the proprietors of the whole of the suit land, in place of the defendant, who currently holds title to the suit property.
 3. There be an order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiffs' peaceful possession and occupation of the said land, in any manner whatsoever and or howsoever.
 4. The deputy registrar and/or the 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 suit land herein in favour of the plaintiffs, in the event of default by the defendant to execute the necessary transfer instruments.
 5. Costs of this originating summons be borne by the defendant.
 6. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
7. In a nutshell, the plaintiffs' lamentation is that as at September 21, 2002, the suit land was registered in the name of the defendant's father, Abuya Juma (Deceased-1). On the said date, the 1st plaintiff and the defendant's mother, Elizabeth Ojenge Abuya (Deceased-2) entered into a land sale agreement (PEXhibit-2) whereby Deceased-2 consented to pursue succession proceedings and transfer the suit land to the 1st plaintiff. Immediately, the plaintiffs took possession of the suit land but Deceased-2 failed to honour PEXhibit 2. The plaintiffs sought the intervention of the area chief who made further endorsed agreement on August 31, 2003 (PEXhibit-3) but it bore no fruit. Thereafter, Deceased-2 died and the defendant registered the suit land in his name and the plaintiffs have remained in peaceful possession of the suit land hence, provoking this suit.
8. The plaintiff (PW1) testified on March 10, 2021. He stated, inter alia, that the suit land is registered in the name of the defendant and that the plaintiffs have been in occupation and possession of the same since the year 2002. PW1 made reference to and relied on the plaintiffs' bundle of documents dated June 25, 2018 (PEXhibits 1 to 7).
9. In their submissions dated June 23, 2022 duly filed herein, the plaintiffs gave a brief background of the matter including the institution of the suit and hearing of the same. Four issues for determination, inter alia, whether the defendant is properly a party in the suit and whether the plaintiffs have proved their case on balance of probabilities, are framed therein. The plaintiff asserted that their possession over the suit land without any permission of the defendant has been uninterrupted for the prescribed period of time. They cited Order 1 Rule 9 of the [Civil Procedure Rules, 2010](#), the case of [Githu v Ndeete](#) (1984) KLR 775 and decision in [James Muniu Mucheru v National Bank of Kenya Ltd](#) (2019) eKLR, among other authoritative pronouncements, to fortify the submissions.



C. The defendant's case

10. The defendant opposed the originating summons by way of his replying affidavit of thirteen paragraphs sworn on August 31, 2018 and duly filed on July 27, 2018. He deposed in part that PExhibit 2 was made in regard to the estate of a deceased person and that he was not privy to it. That he did not sign PExhibit 2 and that the same has many inconsistencies.
11. The defendant further deposed that the suit land is in his name and urged the court to dismiss the suit with costs. The defendant annexed to his affidavit, documents marked as "MOAA 1 and MO 2 (a) and (b)" which are included in DExhibits 1 to 3 herein.
12. The evidence of the defendant (DW1) adduced on February 28, 2022 is premised upon DExhibits 1 to 3. To a great extent, DW1 reiterated the contents of his replying affidavit in his evidence.
13. By the submissions dated April 4, 2022 and duly filed on April 8, 2022, learned counsel for the defendant made reference to the originating summons and identified six issues for determination. In discussing the issues, counsel submitted that the plaintiffs have failed to prove their claim to the requisite standard and urged the court to dismiss the claim with costs. To buttress the submissions, counsel relied on authorities including *Re the estate of M'ngarithi M'Miriti 2017 KLR and Wambugu v Njuguna* (1983) KLR 172.

D. Issues for determination

14. This court is aware of Order 15 of the *Civil Procedure Rules, 2010* on issues in a suit. Also, I subscribe to the Court of Appeal decision in *Great Lakes Transport Company (U) Ltd v Kenya Revenue Authority* (2009) KLR 720 pertaining to issues for determination in a suit generally.
15. Having carefully considered the parties' respective pleadings, the evidence, the submissions as well as the versions of the issues duly filed herein, I am of the view that the issues for determination herein are the questions stated on the face of the originating summons and are condensed to the adverse possession dictates as noted in the case of *Elijah O.L. Opar v Tobias Odhiambo Abach* (2019) eKLR where the Court of Appeal approved the decision of this court and held that the applicant must prove on a balance of probabilities, the ingredients of adverse possession namely that the applicant;
 - a. had entered upon the subject land openly, peacefully, without the permission of the registered owner, and
 - b. has continued in such possession for an uninterrupted period of at least 12 years and
 - c. has dispossessed the owner and extinguished his right and title thereto.

E. Discussion and determination

16. In respect of the issue of registration of the suit land, PExhibit 4 shows that the suit land was registered on 7th April 1975 in the name of Deceased-1. This was done during the regime of the *Registered Land Act* Chapter 300 Laws of Kenya (Repealed).
17. In the case of *Wainaina v Murai and others* (1976-80) 1 KLR 283 at 289/90, Simpson J (As he then was) observed in part; ".....The land in question is registered under the Registered Land Act, an Act cited in section 37....."
18. Presently, the suit land is registered in the name of DW1 with effect from May 11, 2012 as disclosed in PExhibits 1 and 5. Clearly, the fact of the said is common ground in this suit.



19. Concerning the second issue, PW1 asserted that he is in possession of the suit land since the year 2002. That DW1 has never asked him to vacate the suit land.
20. It was the testimony of PW1 that he bought the suit land from the mother of DW1. That he is in occupation and possession of the same by way of cultivation. Further, PW1 testified that DW1 did not claim or object to PExhibit 2.
21. The testimony of PW1 was confirmed by DW1 who testified that the former cultivates the suit land as per PExhibit6 showing maize, trees and kale grown thereon.
22. Plainly, DW1 affirmed that PW1 is in possession of the suit land and that he entered thereunto after the death of his (DW1) father (Deceased-1). He also confirmed that he neither complained to the police nor claim the suit land from the plaintiffs.
23. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma and 3 others* (2017) eKLR which applied the reasoning in *Kimani Ruchine and another v Swift Rutherford Co Ltd and another* (1976-80) 1KLR 1500.
24. Regarding the third issue, PW1 testified that he is in peaceful possession of the suit land since the 2002. During further cross examination, DW1 admitted that PW1 is in possession of the suit land.
25. In that regard, the defendant has been dispossessed of the suit land by the plaintiffs since his enjoyment and use thereof are not possible; see generally *Halsbury's Laws of England* 3rd Edition Volume 24 paragraphs 481 and 482 at pages 251 and 252.
26. To that end, it is the finding of this court that the plaintiffs have established the ingredients of adverse possession over the suit land against the defendant to the requisite standard. The defendant's opposition thereto is a sham and the same fails
27. Accordingly, I would enter judgment for the plaintiffs against the defendant in terms of questions 1, 2, 3, 4 and 5 as set out on the face of the originating summons and as stated in paragraph 6 (a) to (e) hereinabove.
28. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 18TH DAY OF OCTOBER, 2022.

G.M.A ONG'ONDO

JUDGE

Present

Mr B.Mulisa, learned counsel for the plaintiffs

Mr. Nyakwamba, learned counsel for the defendant

Angela, Court assistant

