



REPUBLIC OF KENYA



**Onani v Muhahala & 2 others (Environment & Land Case 18 of 2021)
[2023] KEELC 16473 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 18 OF 2021**

**BN OLAO, J
MARCH 23, 2023**

BETWEEN

GABRIEL OUNDO ONANI APPLICANT

AND

OBWAYO ODONGO 1ST RESPONDENT

ODONGO MUHAHALA 2ND RESPONDENT

MICHAEL ODWORI ODERO 3RD RESPONDENT

JUDGMENT

1. Gabriel Oundo Onani (the Applicant herein) approached this Court by way of his Originating Summons dated 19th October 2021 and premised on the provisions of Sections 7 and 38 of the [Limitation of Actions Act](#) as well as Order 37 of the [Civil Procedure Rules](#). He sought a determination of the following questions as against Odongo Muhahala, Obwayo Odongo And Michael Odwori (the 1st, 2nd and 3rd Respondents respectively) in respect to the land parcel No Bunyala/Bulemia/817 (the suit land):
 1. Whether the Applicant has been in open and notorious possession of the whole portion of land parcel No Bunyala/Bulemia/817 since 1974 to-date which is a period exceeding 12 years.
 2. Whether the Respondents title to the land parcel No Bunyala/Bulemia/817 upon expiry of 12 years from the time the Applicant went into possession of the said land (sic).
 3. Whether the Applicant has now acquired title to the said land parcel No Bunyala/Bulemia/817 by way of adverse possession.
 4. Whether the registration of the Respondents as owners of the land parcel No Bunyala/Bulemia/817 should be cancelled and the Applicant be registered as the owner of the said land.



5. Who should pay the costs of this cause.

Arising out of the determination of the above, the Applicant sought judgment in the following terms:

1. The Respondents right over the land parcel No Bunyala/Bulemia/817 got extinguished by adverse possession upon expiry of the 12 years from the date the Applicant came into possession.
 2. That the Respondents be perpetually barred taking and or using the Applicants land namely land parcel No Bunyala/Bulemia/817.
 3. That the Applicant be registered as the proprietor of the land parcel No Bunyala/Bulemia/817.
 4. That the Respondents do execute all the relevant documents to facilitate the transfer of the land parcel No Bunyala/Bulemia/817 into the name of the Applicant and in default, the Deputy Registrar do execute the same in place of the Respondents.
 5. The Respondents do pay the costs of this cause.
2. The Originating Summons is supported by the Applicant's affidavit of even date to which is annexed the Green Card showing that the suit land has since 14th August 2015 been registered in the name of the 3rd Respondent as personal representative of the Estate of Odero Muhahala Obwayo.
 3. It is the Applicant's case that the suit land is registered in the name of the Respondents. However, the Applicant has established homes thereon and also uses it for agricultural purposes. Although the Applicant has deposed in paragraph 4 of his affidavit that photographs of the homes are annexed, no such photographs were infact availed. That the Respondents have never been in occupation of the suit land which he is in actual possession thereof having extensively developed it since 1974, a period of over 12 years, openly, peacefully, continuously and without interruption from the Respondents and having buried over seven (7) members of this family on the suit land which all his friends, relatives and neighbours know belongs to the Applicant.
 4. The record shows that the Respondents were served on 6th December 2021 with the Originating Summons. However, as at the time of hearing on 20th March 2023, none of the Respondents had filed any replying affidavit withstanding the fact that the firm of B. M. Ouma & Company Advocates entered appearance on their behalf.
 5. When the suit came up for hearing on 20th March 2023, a date which had been taken by consent on 15th November 2022, there was no appearance by either Mr Ouma nor the Respondents and neither had they filed any replying affidavit or any other response to the Originating Summons despite having been indulged. The application by Mr. Wambura holding Mr Ouma's brief to further adjourn this case was declined. The hearing therefore proceeded *ex-parte*.
 6. The Applicant was the only witness who testified in support of his claim. He adopted as his testimony the contents of his supporting affidavit dated 19th October 2022 which I have already summarized above. He also produced as his documentary evidence the Green Card to the suit land as certified on 12th August 2021.
 7. The Respondents and their counsel not having appeared and their application for adjournment having been declined, Mr Okeyo counsel for the Applicant asked the court to mark the defence case as closed and the Court obliged.



8. I have considered the Originating Summons, the Applicant’s supporting affidavit and the annexed Green Card to the suit land. As no rebuttal was filed to the supporting affidavit, the Applicant’s averments remain un-challenged. It is his case that he has been in occupation and possession of the suit land since 1974. That he has extensively developed the same and even some of his family members are buried thereon. And although he made reference to some photographs of the suit land in his supporting affidavit, none were in fact availed.
9. the Applicant has approached this Court citing the provisions of Sections 7 and 38 of the Limitation of Actions Act. Those provisions read:
- “7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
- 38.
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
10. It is now well established that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – *Benjamin Kamau & Others -v- Gladys Njeri* C.A. Civil Appeal No 2136 of 1996.
11. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It said:
- “And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.”
- Such possession must be without force, stealth and the permission of the owner (*nec vi, nec clam, nec precario*) - *Kimani Ruchine -v- Swift Rutherford* Co. Ltd 1980 KLR 10. It must be open, continuous, peaceful, notorious and with the knowledge of the owners – *Robert Shume & Others -v- Samson Kazungu Kalama* 2015 eKLR.
12. In a recent exposition on the doctrine of adverse possession, the Court of Appeal stated as follows in the case of *Mtana Lewa -v- Kabindi Ngala Mwangandi* C.A. Civil Appeal No 56 of 2014 [2015 eKLR]:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. It must be adequate in continuity, in publicity and in extent



to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms ...”

It is not clear how the Applicants took possession and went into occupation of the suit land in 1974 and has remained thereon to-date. However, from his testimony which has not been rebutted, he had remained thereon for a period of 47 years by the time this suit was filed in 2021. That is well beyond the limitation period of 12 years which entitles him to the orders of adverse possession. There is nothing to suggest that his occupation and possession of the suit land has not been peaceful, open, continuous, notorious and with the knowledge of the registered owner. The Green Card to the suit land shows that it was first registered in the name of Odero Muhahala on 2nd October 1985 before being registered in the name of the 3rd Respondent on 14th August 2015 as personal representative of Odero Muhahala following Succession Cause NO 356 of 2011 Busia. Although the 3rd Respondent was only registered as the proprietor of the suit land on 14th August 2015 following succession proceedings, the law is that a mere change of ownership of land occupied by another through adverse possession does not interrupt such possession – *Gitbu -v- Ndeete* 1984 KLR 776. Therefore, when the 3rd Respondent obtained registration of the suit land in his name on 14th August 2015 by way of transmission, his title was and still is subject to the overriding interest enjoyed by the Applicant by way of adverse possession as provided under Section 28(h) of the *Land Registration Act*.

13. Therefore, believing the Applicant’s un-controverted evidence as I do, I have no hesitation in answering the issues set out for my determination in his Originating Summons in his favour.
14. It is clear however that the suit land is registered only in the name of the 3rd Respondent. The names of the 1st and 2nd Respondents do not appear on the Green Card. A claim for land by way of adverse possession is by law directed only against the registered proprietor of the land in dispute. Therefore, since the suit land is only registered in the name of the 3rd Respondent, the claim as against the 1st and 2nd Respondents as to cancellation of title must be dismissed.
15. Ultimately, there shall be judgment for the Applicant as against the 3rd Respondent in the following terms:
 1. The Applicant has acquired by way of adverse possession the land parcel No Bunyala/Bulemia/817 by way of adverse possession the 3rd Respondent’s title therein having been extinguished by operation of law.
 2. The 3rd Respondent shall within 30 days from the date of this judgment surrender for cancellation the original title deed to the land parcel No Bunyala/Bulemia/817 and execute all necessary documents to facilitate the registration of the said land in the name of the Applicant.
 3. In default of (2) above, the Deputy Registrar shall execute all such documents on behalf of the 3rd Respondents to facilitate that registration.
 4. Thereafter, the Respondents, their agents, servants or any other persons acting through them shall be permanently barred from taking and/or using the land parcel No Bunyala/Bulemia/817.
 5. The claim against the 1st and 2nd Respondents is dismissed but only in respect to prayers (1), (2) and (3). Prayer (4) shall apply to them.
 6. No orders as to costs.

BOAZ N. OLAO



JUDGE

23RD MARCH 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF MARCH 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED ON 20TH MARCH 2023. RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

23RD MARCH 2023

