



**Musumba & another v Ojiambo & 4 others (Environment & Land Case 125 of 2016) [2025] KEELC 1469 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1469 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 125 OF 2016**

**BN OLAO, J  
MARCH 25, 2025**

**BETWEEN**

**CAMULUS OSENO MUSUMBA ..... 1<sup>ST</sup> PLAINTIFF**

**JUSTUS OMBUI ONYANGO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PATRICK BARASA OJIAMBO ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN OJIAMBO ..... 2<sup>ND</sup> DEFENDANT**

**FRANCIS OJIAMBO ..... 3<sup>RD</sup> DEFENDANT**

**DOUGLAS JUMA ..... 4<sup>TH</sup> DEFENDANT**

**MOSES OJIAMBO ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Camulus Oseno Musumba and Justus Ombiji Onyango (the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively) moved to this Court vide their Originating Summons dated 19<sup>th</sup> September 2016 and filed on 20<sup>th</sup> September 2016. They impleaded Patrick Barasa Ojiambo, Stephen Ojiambo, Francis Ojiambo, Douglas Juma and Moses Ojiambo (the 1<sup>st</sup> to 5<sup>th</sup> Respondents respectively) claiming to have obtained the land parcel No Samia - Wakhungu/Odiado/67 (the suit land) by way of adverse possession. They therefore sought a determination of the following questions:

1. Whether the Plaintiffs have been in open, quiet and un-interrupted possession and occupation of the land parcel No Samia - Wakhungu/Odiado/67 for an aggregate period of or exceeding 12 years.
2. Whether the Defendants' title to the land parcel No Samia - Wakhungu/Odiado/67 has been extinguished.



3. Whether the Plaintiffs have acquired title to the land parcel No Samia - Wakhungu/Odiado/67 by way of adverse possession.
4. Whether the Plaintiffs should be registered as the absolute owners of the land parcel No Samia - Wakhungu/Odiado/67.
5. Whether the Defendants should bear the costs of this suit.

The Plaintiffs are brothers and the Originating Summons is supported by the affidavit of the 1<sup>st</sup> Plaintiff who was the only witness who testified in support of their case relying on the supporting affidavit dated 20<sup>th</sup> September 2016.

2. In the said affidavit, it is deposed that the Plaintiffs are the sons to the late Onyango Namukomawho was the owner of the suit land having inherited it from his father Ombiji Nakoma. That they have lived on the suit land for a long time with the knowledge of the Defendants although the land was registered in the name of the Defendants' father Ojiambo Namude during the adjudication period in 1970 because the Plaintiffs' father was away in Uganda where he was employed. The Defendants' father was therefore registered as proprietor of the suit land to hold it in trust for his cousin the Plaintiffs' father a fact that has been acknowledged by their relatives. That the Funyula Land Disputes Tribunal (the Tribunal) up-held the claim that the Defendants' father held the suit land in trust which decision was also confirmed as a Decree of the Busia Resident Magistrate's Court and an eviction order was issued against the Defendants. It is the Plaintiffs' case, therefore, that their occupation of the suit land has been adverse and they are entitled to the orders that they have acquired the suit land by way of adverse possession.
3. The following documents are annexed to the supporting affidavit:
  1. A copy of the Green Card to the land parcel No Samia - Wakhungu/Odiado/67 in the names of the Defendants.
  2. Copy of Decision of the Tribunal directing that the 1<sup>st</sup> Defendant be evicted from the suit land.
  3. Copy of the Decree issued in Busia Principal Magistrate's Court Case No296 of 2003 dismissing the 1<sup>st</sup> Defendant's suit against the Plaintiffs and the Tribunal.
  4. Copy of an eviction order issued in Busia Principal Magistrate's Court Land Case No15 of 2003 ordering the Officer Commanding Funyula Police Post to evict the 1<sup>st</sup> Defendant from the suit land.
4. The Originating Summons was opposed.
5. The 1<sup>st</sup> Defendant filed a statement dated 25<sup>th</sup> July 2022, a replying affidavit dated 11<sup>th</sup> August 2021 and a further replying affidavit dated 2<sup>nd</sup> May 2023 in opposition to the Originating Summons.
6. In his replying affidavit dated 25<sup>th</sup> July 2022, the 1<sup>st</sup> Defendant deposed, inter alia, that the Plaintiffs are strangers to the suit land and he does not know Onyango Namukoma or Ombiji Nakoma and neither are they related to him. That his late grandfather had three (3) sons namely Ojiambo Namude Omia, Namude Omia and Ndugume Omia and had divided the suit land being ancestral land amongst the three (3) sons before the land adjudication process and he is the Administrator to the Estate of Ojiambo Namude who died on 1<sup>st</sup> November 1989. That his late grandfather had settled each of his sons on their respective portions of land. During the land adjudication and registration process, the 1<sup>st</sup> Defendant's father was registered as the proprietor of the suit land and the Applicants were not living on the said land which was used exclusively by the Defendants. Following the death of their father, the



1<sup>st</sup> Defendant petitioned for Grant of Letters of Administration of his estate vide P&A No 40 of 1998 which included the suit land. The Plaintiffs filed an objection on the ground that they should have been included as beneficiaries but their objection was dismissed and in 2002, the Plaintiffs forcefully entered the suit land and started constructing thereon. The Defendants complained to the District Officer (DO) at Funyula who instructed them to go back to the suit land since it belonged to them. In 2003, the Plaintiffs filed a suit against the 1<sup>st</sup> Defendant at the Samia Land Disputes Tribunal vide Case No 001 of 2003 claiming that the suit land belonged to them. The Tribunal ruled in their favour and the Plaintiffs applied to have the award adopted as a judgment of the Court in Busia Senior Resident Magistrate's Court land case NO 15 of 2003. The Defendants challenged the judgment vide Busia Principal Magistrate's Court Civil Case No 290 of 2003 and the Tribunal's award was nullified and the Plaintiffs were evicted from the suit land. However, on 11<sup>th</sup> January 2007, the Defendants claim was dismissed and on 1<sup>st</sup> May 2009, the Plaintiffs succeeded in evicting the Defendants from the suit land and demolished their house rendering them homeless.

7. In 2014, the Plaintiffs filed Busia ELCCase No202 of 2014 claiming the suit land by way of adverse possession. The suit was however dismissed with costs for want of prosecution. Then in 2016, the Plaintiffs filed this suit yet they have never lived on the suit land. The 1<sup>st</sup> Defendant therefore sought the dismissal of this suit.
8. The 1<sup>st</sup> Defendant had earlier filed a statement dated 11<sup>th</sup> August 2021 which is basically a rehash of the contents of the replying affidavit dated 25<sup>th</sup> July 2022. He added that his late father was buried on the suit land together with his three (3) other siblings. And in 2003, his wife was buried on the same land. He denied having been a party in the Tribunal proceedings or that he was present and refused to give evidence. The Tribunal's ruling was therefore arrived at maliciously and his application to set it aside was equally dismissed. That the Defendants were later evicted from the suit land in 2010 but the Plaintiffs' suit filed in Busia ELC Case No 2014 seeking the suit land by adverse possession was dismissed for want of prosecution. They have therefore been rendered homeless by the Plaintiffs' actions.
9. The 2<sup>nd</sup> Defendant also filed a statement dated 25<sup>th</sup> July 2022 in response to the Originating Summons. He stated that he is a beneficiary to the Estate of their late father Ojiambo Namude who died on 1<sup>st</sup> November 1989 and the Plaintiffs are strangers to the suit land which is ancestral land. That their grandfather had three (3) sons namely Ojiambo Namude Omia, Namude Omia and Ndugume Omia whom he had settled on their respective portions of the suit land. That the Defendants' father was registered on the suit land during the adjudication process and that the Plaintiffs were not living on the said land.
10. After the death of the father, the 1<sup>st</sup> Defendant obtained a Grant of Letters of Administration to his Estate and the Plaintiffs' objection was dismissed.
11. In 2002, the Plaintiffs forcefully entered the suit land and started constructing thereon when the Defendants were away. The Defendants' mothers Herenia Hayoko Ojiambo and Hanna Auma Ojiambo informed them about the Plaintiffs' entry onto the suit land and the Defendants reported to the District Officer who instructed them to go back to the suit land.
12. In 2003, the Plaintiffs filed a suit against the 1<sup>st</sup> Defendant at the Tribunal being case No 001 of 2003 claiming the suit land and the dispute was decided in their favour and adopted as a judgment of the Court at the Magistrate's Court in Busia Senior Resident Magistrate's Case No 15 of 2003. The 1<sup>st</sup> Defendant's attempt to nullify the award of the Tribunal was dismissed. The Plaintiffs then obtained an eviction order against the Defendants on 1<sup>st</sup> May 2009 and proceeded to demolish their houses rendering the Defendants homeless. Then in 2014, the Plaintiffs filed a suit No Busia ELC No 202



of 2014 seeking the suit land by way of adverse possession but the same was dismissed for want of prosecution. The Plaintiffs have now filed this suit yet they have never lived on the suit land peacefully and un-interrupted for over 12 years as claimed.

13. The 3<sup>rd</sup> Defendant also filed a statement dated 25<sup>th</sup> July 2022 in which he too repeated the averments contained in the 1<sup>st</sup> Defendants replying affidavit and the 2<sup>nd</sup> Defendant's statement.
14. The 4<sup>th</sup> and 5<sup>th</sup> Defendants by their statements dated 25<sup>th</sup> July 2022 similarly repeated the same averments of their siblings. The thread which runs through their evidence is that the Plaintiffs are strangers to the suit land and have never lived on it peacefully and un-interrupted for the period of 12 years as alleged.
15. The Defendants annexed to their replying affidavits and statements various documents and also filed lists of documents dated 11<sup>th</sup> August 2021 and 25<sup>th</sup> July 2022. These documents are:
  1. Copy of Register for the land parcel No Samia - Wakhungu/Odiado/67 in the names of the Defendants.
  2. Copy of confirmed Grant issued to the Defendant in respect to the Estate of Ojiambo Namude Omia in Succession Cause NO 40 of 1998.
  3. Copy of ruling delivered on 22<sup>nd</sup> September 1999 in Succession Cause No 40 of 1998.
  4. Copy of decree issued in Busia Principal Magistrate's Court Civil Suit No 290 of 2003 on 11<sup>th</sup> July 2007.
  5. Copy of proceedings in Busia ELC Case No 202 of 2014.
  6. Copy of Certificate of Death of Ojiambo Namude Omia.
  7. Copy of eviction order issued on 1<sup>st</sup> April 2009 in Busia Principal Magistrate's Court Land Case No 15 of 2003.

The plenary hearing commenced on 11<sup>th</sup> May 2023 and the 1<sup>st</sup> Plaintiff was the only witness who testified in support of the Plaintiff's case. He adopted as his testimony the contents of his affidavit filed in support of the Original Summons. He also produced as part of his documentary evidence the documents filed herein.

16. All the Defendants also testified in rebuttal of the Plaintiffs' claim. They adopted as their evidence the contents of their statements dated 25<sup>th</sup> July 2022 and also produced as their documentary evidence the documents already referred to above.
17. Submissions were thereafter filed both by Ms Toloi instructed by the firm of Namatsi & Company Advocates for the Plaintiffs and by Ms Achala instructed by the firm of Abalo & Company Advocates for the Defendants.
18. I have considered the evidence by the parties including the documents filed as well as the submissions by counsel.
19. The Plaintiff's claim is that they are entitled to the suit land by way of adverse possession having occupied it peacefully and un-interrupted for a period exceeding 12 years. The Defendants' case is that the Plaintiffs are not related to them and have never occupied the suit land peacefully and un-interrupted as claimed by the Plaintiffs and that in fact the same is not ancestral land but is land transferred to them from their late father after succession process. The only issue which this Court



needs to interrogate is whether the Plaintiffs have met the threshold for an order that they have acquired the suit land by way of adverse possession.

20. Before I delve into the merits or otherwise of the Plaintiffs' case, I must first consider whether the Plaintiffs' case is in fact *res judicata* Busia ELC Case No 202 of 2014. Though not specifically pleaded, the existence of Busia ELC Case No 202 of 2014 has been referred to by the parties. The Plaintiffs herein were also the Plaintiffs in that case as were the Defendants. That case was dismissed by KaniaruJ on 23<sup>rd</sup> January 2018 for want of prosecution following the Plaintiffs' failure to attend Court on the hearing date. The issue which I need to consider therefore is whether the dismissal of a suit for want of prosecution renders a subsequent suit involving the same parties and subject matter *res judicata*. Section 7 of the *Civil Procedure Act* which defines the doctrine of *res judicata* reads:

7. "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." Emphasis mine.

My understanding of the above is that for *res judicata* to apply, the previous suit must have "been heard and finally decided" on the merits. Where a suit is dismissed for want of prosecution as happened in Busia ELC Case No 202 of 2014, it can hardly be said that the previous suit was "heard and finally decided" on the merits. Where a suit is dismissed for want of prosecution as happened in Busia ELC Case No 202 of 2014, it can hardly be said that the previous suit was "heard and finally decided."

21. There have been divergent views by Superior Courts as to whether or not the dismissal of a suit on a technical ground can amount to *res judicata*. In the case of *Njue Njagi v Ephantus Njiru Ngai C.A. Civil Appeal No29 of 2015 [2016] eKLR*) the Court took the view that the dismissal of a suit for want of prosecution amounts to a judgment from which a decree follows and therefore renders any subsequent suit *res judicata*. However, in the case of *Tee Gee Electrical & Plastics Company v Kenya Industrial Estates Ltd C.A. Civil Appeal No. 333 of 2001 [2005 2 KLR 97]*, the Court took the view that *res judicata* only applies where the dispute in the previous suit was heard and determined by the Court on the merits but not where that suit was disposed of on the basis of a technicality such as jurisdiction or for want of prosecution. The Court addressed that issue as follows:

"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* where it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore does not trigger the plea of *res judicata*."

The Court of Appeal took the same view in the case of *Caneland Ltd & Others v Delphis Bank Ltd C.A. Civil Appeal No20 of 2000* and also in the case of *Michael Bett Siror v Jackson Koech C.A. Civil Appeal No 53 of 2016 [2019 eKLR]*. I agree with the Courts in the latter views that the dismissal of a case for want of prosecution does not amount to *res judicata* because a clear reading of Section 7 of the *Civil Procedure Rules* shows that *res judicata* means a case which has "been heard and finally decided". Busia ELC Case No 202 of 2014 was not "heard and finally decided" and it cannot therefore be raised to support a claim on *res judicata*.



22. I have taken time to interrogate the issue of res judicata because it goes to the jurisdiction of this Court to determine this suit and is an issue which a Court can even raise and consider on its on motion. Res judicata does not therefore apply in this case.

23. Having said so, the Plaintiffs' claim to the suit land by way of adverse possession is anchored on the provisions of Section 38(1) of the Limitation of Actions Act which provides that:

“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 they registered as proprietor of the land.”

24. This being a claim to land by way of adverse possession, and as was held by Kneller J In *Kimani Ruchine & Another v Swife Rutherford & Company Ltd* 1976-80 I KLR 1500;

“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; see *Wanyoike Gathure v Beverly* 1965 E.A. 514.”

In *Kasuve v Mwaani Investment Ltd & Others* 2004 I KLR 184, the Court held that:

“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 – *Wanje v Saikwa* (NO2) 1984 KLR 284.”

Such occupation must also be peaceful and without the permission of the owner – *Grace Wairimu Soroma v Chaka Ltd & Others* 2017 eKLR.

25. In the case of *Wambugu v Njuguna* 1983 KLR 172, it was held that:

“In order to acquire by the statute of Limitations a 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 property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

The Court went on to add as follows:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and 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.”



Finally, in the case of *Mtana Lewa v Kahindi Ngala Mwangandi C.A. Civil Appeal No56 of 2014* [2015 eKLR], Makhandia JA described the doctrine of adverse possession as follows:

“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, 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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

26. The 1<sup>st</sup> Plaintiff who was the only witness who testified in support of the Plaintiffs’ case has deponed in his supporting affidavit dated 20<sup>th</sup> September 2016 and whose contents he adopted during the trial that the suit land belonged to their late father who had in turn inherited it from his father. That the Plaintiffs have lived peacefully and un-interrupted on the suit land and during the Land Adjudication process in the 1970’s, their father was away in Uganda where he was employed and so the suit land was registered in the names of the Defendants’ late father to hold in trust for his cousin who was the Defendants’ late father to hold in trust for the Plaintiff’s father. When he was cross-examined on 11<sup>th</sup> May 2023 during the plenary hearing by Ms Achala counsel for the Defendants’, he said:

“Me and the 2<sup>nd</sup> Plaintiff were born on the land in dispute. I was born in 1963. It is true that both me and the Defendants live on the land. My late father and I had moved to Uganda in 1977 where he worked. We then returned to the suit land in 2003 because it belonged to our grandfather. The land was registered in the name of our grandfather and the Defendants only became the registered proprietors in 2001 to hold in trust for me and the 2<sup>nd</sup> Plaintiff.”

The Defendants’ defence, as captured in the 1<sup>st</sup> Defendant’s replying affidavit dated 11<sup>th</sup> August 2021 and replicated in the other Defendant’s statement is that infact they are not related to the Plaintiffs who were not living on the suit land during the Land Adjudication process. That the suit land belonged to their late father and was transmitted to them following orders issued in Succession Cause No 40 of 1998 but the Plaintiff forcefully entered thereon in 2002 and started constructing a building thereon.

27. By the 1<sup>st</sup> Plaintiff’s own testimony, he was born on the suit land in 1963 but moved to Uganda with his father in 1977. That being the position, the 1<sup>st</sup> Plaintiff was 14 years old when he moved to Uganda with his father and I have not heard him say that his sibling the 2<sup>nd</sup> Plaintiff remained on the suit land. Therefore, the 1<sup>st</sup> Plaintiff was a minor under 18 years of age in 1977 and time, for purposes of adverse possession, could not run in his favour when he was a minor. He returned to the suit land in 2003 when he was 40 years of age and that was when time started running in his favour. However, the Defendants’ case is that the Plaintiffs re-entered the suit land forcefully and started constructing a building thereon. This prompted the Defendants to complain to the District Officer (DO) at Funyula. Thereafter, there were several cases involving the parties herein both at the Funyula Land Disputes Tribunal being case No 001 of 2003 and at the Busia Magistrates Court Land Case No 15 of 2003 and Civil Case No 290 of 2003. The Plaintiffs’ re-entry onto the suit land in 2003 and their occupation cannot therefore be described as having been peaceful yet, from the relevant precedents, such occupation and possession has to be peaceful and without forced – *Kimani Ruchine & Another v Swift Rutherford & Company Ltd* (supra), *Grace Wairimu Sorma v Chaka Ltd* (supra) among others. On that ground alone, the Plaintiffs’ claim to the suit land by way of adverse possession must collapse.



28. The law is also clear that to succeed in a claim for land by way of adverse possession, the Plaintiffs were required to prove that they had dispossessed the Defendants of the suit land or that the Defendants had, on their own volition, discontinued their possession thereof. In *Wambugu v Njuguna* 1983 KLR 172, it was held that:

“In order to acquire by the statute of Limitations a 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 property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

The Court went on to add that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and 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.”

The Plaintiffs are claiming the whole of the suit land, not just a portion of it. As already stated above, when the 1<sup>st</sup> Plaintiff was cross-examined by Ms Achala, he said:

“It is true that both me and the Defendants live on the land.”

In paragraph 17 of his replying affidavit dated 11<sup>th</sup> August 2021, the 1<sup>st</sup> Defendant has deposed thus:

17. “That my late father was buried on this suit land and my other 3 siblings and my wife was also buried on this land in 2003.”

It is obvious from the above that the Plaintiffs have not dispossessed the Defendants of the suit land as required in law and there can be no justification for the orders which they seek that they are entitled to the whole of the suit land by way of adverse possession. If they were seeking only a portion thereof nothing would have been easier than saying so and even then, any such claim would have been defeated by the fact that such occupation is not peaceful as already stated above.

29. Further, there is evidence that the Plaintiffs obtained an eviction order in Busia Principal Magistrates Court Land Case No15 of 2003 against the 1<sup>st</sup> Defendant. When he was cross-examined by Ms Achala, on 11<sup>th</sup> May 2023, the 1<sup>st</sup> Plaintiff said:

“The Defendants are no longer on the land in dispute. They left in 2008.”

And when the 1<sup>st</sup> Defendant testified on the same day, this is what he said in his evidence in chief:

“The suit land belonged to our grandfather. I ask the Court to give us the land back to us and dismiss the Plaintiffs’ claim. We want to go back to the land.”

If the Defendants were evicted from the suit land pursuant to a Court order which placed the Plaintiffs in possession thereof, that cannot be the basis of a claim to the same by way of adverse possession. To warrant the Plaintiffs claim to the suit land by way of adverse possession, the dispossession and occupation thereof should not be due to the coercive order of a Court. When it is, then it is not peaceful since the land owner has no option but to comply with the orders of the Court directing his dispossession through eviction.



30. Finally, the Plaintiffs also anchored their claim on trust alleging that they are related to the Defendants who denied that allegation terming the Plaintiffs to be strangers. In paragraphs 8 and 9 of the supporting affidavit, the 1<sup>st</sup> Plaintiff has deposed thus:

8: “That the land was therefore registered in the name of Ojiambo Namude the Respondents’ late father to hold the title in trust for his cousin our late father (attached hereto and marked COM-1 is copy of the Register)”.

9: “That the ownership of the suit land by Ojiambo Namude in trust for our late father has always been widely acknowledged by our relatives, neighbours and even those in authority.”

However, the Defendants denied any relationship with the Plaintiffs and termed them as strangers. In paragraphs 15 and 16 of his replying affidavit, the 1<sup>st</sup> Defendant deponed thus:

15: “That my late father Ojiambo Namude is not in any way related to the Applicant’s late father Onyango Namukoma and as such I do not know the Applicant.”

16: “That the suit land is our ancestral land which the Applicants want to take it away forcefully from us.”

In paragraph 2 of his replying affidavit, the 2<sup>nd</sup> Defendant deponed thus:

“I know the Applicants as strangers to our ancestral land Samia-Wakhungu-Odiado/67. And I do not know Onyango Namukoma nor do I know Ombiji Namukoma because they are not in any way related to me.”

The Plaintiffs claim, as stated earlier, is anchored on adverse possession. It is not based on trust. And the trust alleged, and which has been denied, is that their father was a cousin to the Defendants’ father. Although not specifically pleaded, I have tried to see if, on the authority of *Odd Jobs v Mubia* 1974 E.A 476, I can make a determination on the un-pleaded issue of trust. The then East Africa Court of Appeal said the following in that case:

“A Court may base its decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the Court for decision.”

The answer to the issue whether the parties herein are truly related and if any claim on trust can be premised on that relationship was given by Mbitoj in Busia High Court P&a Cause No40 of 1998. In that case in which the Plaintiffs were objecting to the grant of Letters of Administration issued to the 1<sup>st</sup> Defendant in respect to the Estate of Ojiambo Namude Omia, the judge had the following to say in the penultimate and last paragraphs of his ruling delivered on 22<sup>nd</sup> September 1999 while dismissing the Plaintiffs’ objection:

“It is also observed that as from 1981 those entitled to a deceased’s estate are his widows, children and dependants. As the objectors are none of the above, they do not have a right to represent the Estate unless all of the aforesaid persons renounce their interest.

The objectors are therefore misconceived. For the above reasons, I hereby dismiss the objections with costs. Orders accordingly.

Dated At Bungomathis 22<sup>nd</sup> day of September 1999.

G. P. Mbitoj

JUDGE.”



Therefore, notwithstanding what may have been said in any other forum, that finding by the judge clearly shows that the Plaintiffs have no basis to try and anchor their claim to the suit land on the basis of being part of the family of the Defendants. Any claim to the suit land on the basis of a trust hinged on family linkage is clearly not supported by any evidence.

31. The up-shot of all the above is that the Plaintiffs claim to the suit land on the basis that they have been in occupation and possession thereof peacefully and un-interrupted for a period of over 12 years and are entitled to be registered as the proprietors of the same by way adverse possession or on the basis of a trust is misconceived and must be dismissed. This Court therefore makes the following disposal orders in respect to the Plaintiffs claim to the land parcel No Samia - Wakhungu/Odiado/67:
1. The Plaintiffs' suit is dismissed.
  2. The Plaintiff shall meet the Defendants' costs of this suit.

**BOAZ N. OLAO**

**JUDGE**

**25<sup>TH</sup> MARCH 2025**

**Judgment dated, signed and delivered by way of electronic mail on this 25<sup>th</sup> day of March 2025 with notice to the parties.**

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**25<sup>TH</sup> MARCH 2025**

