



**Odakha & another v Lubia (Environment & Land Case E028 of 2021)
[2023] KEELC 17404 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E028 OF 2021**

**BN OLAO, J
MAY 11, 2023**

BETWEEN

HENRY ANDERA ODAKHA 1ST PLAINTIFF

VICTOR BARASA ODAKHA 2ND PLAINTIFF

AND

IMELDA WERE LUBIA DEFENDANT

JUDGMENT

1. Vide their Originating Summons dated May 27, 2021, Henry Andera Odakha and Victor Were Lubia (the 1st and 2nd Plaintiffs respectively) laid claim to the land parcel No Samia/butabona/836 (the suit land) currently registered in the name of Imelda Were Lubia (the Defendant) alleging that they are entitled to be registered as proprietors thereof by way of adverse possession. They therefore sought a determination of the following questions:
 1. Whether the Plaintiffs have been in open, quiet and notorious possession of the land registration number No Samia/butabona/836 or any other title derived therefrom as on the ground for a period of over 40 years exceeding 12 years required in law for acquisition of land by adverse possession.
 2. Whether the Defendant's entitlement and title to all that land comprised in Samia/butabona/836 has become extinguished upon expiry of 12 years from the time the Plaintiffs have been in possession since the year 1989.
 3. Whether the Plaintiffs have acquired title to the land registration number No Samia/Butabona/836 or any other title derived therefrom as on the ground by virtue of adverse possession and whether such title shall be issued for the portion they possess.



4. Whether mutation should be done for a defined portion of No Samia/butabona/836 and registration be done accordingly.
 5. Who should pay costs of this application?
2. Arising out of the determination of those issues, the Plaintiffs sought judgment against the Defendant in the following terms:
- a. That the Defendants' rights over the land registration number No Samia/Butabona/836 or any title derived therefrom as on the ground as possessed by the Plaintiffs is extinguished by adverse possession from the time the Plaintiffs acquired the same by virtue of inheritance from their late father Cornel Odakha Mafulu.
 - b. That the Plaintiffs do and are hereby granted right of title to land registration number Samia/Butabona/836.
 - c. That the Defendants do execute all the relevant documents necessary to mutate their respective portions as occupied on the ground and in default the Deputy Registrar be authorized to do so after expiry of defined period.
 - d. Costs be borne by the Defendant.
3. Together with the Originating Summons, the Plaintiffs filed their supporting affidavits as well as statements. They also filed their witness statements ie Longinus Nyongesa (PW2) and Emmanuel Owori Ogutu (PW3).
4. In his supporting affidavit dated May 27, 2021 and statement dated May 18, 2021, the 1st Plaintiff states that he and his brother the 2nd Plaintiff are sons of the late Cornel Odakhu Mafulu who, prior to his death, had been in peaceful occupation of the suit land which was created following the subdivision of the land parcel No Samia/Butabona/638. That the suit land is registered in the name of the Defendant while the other portion being No Samia/Butabona/835 is registered in the name of one Clement A Mukoya. That he was born on the suit land in 1989 where he grew up and still resides and that the Defendant has never taken possession of the suit land. That his late father was in the process of following up on the creation of the suit land and land parcel No Samia/Butabona/835 and had even placed a caution on both parcels. That both he, the 2nd Plaintiff and their family live on the suit land where they have buried their father, mother as well as their grandparents. That other than his home, he also has planted trees and cultivates it for over 40 years and the Defendant does not live on the said land.
5. The above averments are repeated in the statement of the 2nd Plaintiff dated May 18, 2021.
6. In his statement dated May 18, 2021, Emmanuel Owori Ogutu (PW3) confirms that he knows both the Plaintiffs and the Defendant. That the suit land originally belonged to the Plaintiffs' grandfather Mafulu Ong'ambo before one Conorado Lubia secretly transferred it to his two children being the Defendant and one Clement A Mukoya. That the Defendant moved away from the suit land and went back to her matrimonial home in the year 2000 leaving the Plaintiffs thereon who have continued living on it ever since.
7. Longinus Nyongesa (PW4) confirmed in his statement dated December 14, 2021 that although the Defendant is the registered proprietor of the suit land, she is married and lives elsewhere and is not in possession of any part of the suit land. The Plaintiffs should therefore be registered as proprietors of the suit land.
8. The Plaintiffs filed the following documents in support of their case:



1. Certificate of official search for the land parcel No Samia/Butabona/836.
 2. Copy of the Identify Card for 1st Plaintiff.
 3. Certificate of death for Cornel Odakha Mafulu.
9. The Defendant filed a replying affidavit dated June 22, 2021 in response to the Originating Summons in which she described it as being misconceived and bad in law. She added that her late father Conrado Lubia had partitioned his land and registered the suit land in her names following the break-down of her marriage. She added further that the Plaintiffs are her nephews and they stay together and so their claim by adverse possession does not arise in law. Further, that the Plaintiffs do not know on what portion of land they reside having earlier filed an application for citation in High Court Miscellaneous Application No. 100 of 2015 which they however did not prosecute.
 10. The Defendant donated a Power of Attorney to the son Christopher Maloba Ogokha (DW1) who recorded a statement dated March 29, 2022. He stated that he grew up on the suit land with the Defendant as his grandmother Adongo who had been inherited by Conrado Lubia and was residing in the land parcel No Samia/butabona/835. That Cornel Odakha was buried on the land parcel No Samia/butabona/835 and not on the suit land. That since the Defendant was ailing, he decided to bring her closer to his family in 2017 but when she gets better, she will go back to her home. In 2020, he learned that the 1st Plaintiff had built a house on the suit land leaving her mother and the 2nd Plaintiff on the land parcel No Samia/Butabona/835. Therefore, the 1st Plaintiff has only lived on the suit land for 2 years and not 40 years as he claims and in any case, he could not have lived on the suit land for 40 years as he is only 32 years old. The 2nd Plaintiff has not lived on the suit land and all along, he has been living on the land parcel No Samia/butabona/835.
 11. The Defendant called Mary Kadembechi Mukoya (DW2) as a witness. In her statement dated December 7, 2021, she confirms that she is the widow of Clement Mukoya the registered proprietor of the land parcel No Samia/Butabona/835 where she has resided since 1999 and is aware that the Defendant resides on the suit land. She adds that none of the Plaintiffs live on the suit land.
 12. The Defendant filed list of documents dated January 27, 2022 containing the Power of Attorney and a further list of documents dated April 6, 2022 containing the Green Card to the land parcel No Samia/butabona/835.
 13. The hearing commenced before Omollo J on July 19, 2022 who heard the evidence of the Plaintiffs and one witness. Thereafter, I heard the testimony of one of the Plaintiff's witness (Victor Barasa PW4) and the Defendant and her witness on February 14, 2023.
 14. After the close of the plenary hearing, counsel agreed to file their submissions by March 13, 2023. However, only the Plaintiff's counsel Mr Ouma filed his submissions.
 15. I have considered the evidence by the parties had the submissions by Mr Ouma. Mr J v Juma counsel for the Defendant appears not to have filed any and if he did, they are not on the record.
 16. The Plaintiffs' case is that they are entitled to a portion of the suit land which they occupy by way of adverse possession. Section 38(1) of the *Limitation of Actions Act* allows them to approach this Court for such orders. It reads:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 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.”

17. It is now well established that the combined effect of the provisions of Sections 7, 13 and 17 of the Limitation of Actions Act is to extinguish the title of the registered proprietor of land in favour of an adverse possessor at the expiry of twelve years of the adverse possession – *Benjamin Kamau & Others v Gladys Njeri* CA Civil Appeal No 213 of 1996. and In *Kasuve v Mwaani Investments Ltd & Others* 2004 I KLR 184, it was stated thus:

“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 discontinuation of possession by the owner on his own volition.”

18. The adverse possession is a fact to be observed upon the land itself – *Maweu v Liu Ranching & Farming Co-operative Society Ltd* 1985 Klr 430. It must not be by force nor secrecy nor stealth. It must also be open, continuous, notorious and without the permission but with the knowledge of the owner. It should also be peaceful – see *Kimani Ruchine v Swift Rutherford Co Ltd* 1980 Klr 10, *Robert Shume & Others v Samson Kazungu Kalama* 2015 eKLR and also *Grace Wairimu Sorora v Chaka Ltd & Others* 2017 eKLR.

19. Before I delve into the merits or otherwise of the Plaintiff’s claim, the Respondent has raised an important issue in paragraph 8 of her replying affidavit in which she has deponed as follows:-

8: “That I am advised by my advocate on record and verily believe the same that as relatives, the claim of adverse possession does not arise in law.”

20. Her counsel Mr J v Juma did not file any submissions wherein he would have guided this court on the averment that adverse possession does not arise where the parties are relatives. Mr Ouma counsel for the Plaintiffs did not make any submissions on that issue. I do not therefore have the benefit of counsels views on the same.

21. I have however looked at the case of *Samuel Kibamba v Mary Mbaisi* CA Civil Appeal No 27 of 2013 [2015 eKLR]. This was a case for adverse possession involving a son and the step-mother. The Court grappled with the issue as to whether a claim for adverse possession could be maintained against family. It said:

“Could the doctrine of adverse possession apply against the suit before the Learned Judge who were related by being mother and step son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgment and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.”

In the same case, however, the judges said:

“It is therefore inevitable to state that the Court must take extreme caution in the determination of the consent given by an owner of land to a relative and be able to determine when such consent was withdrawn. This determination is a matter of fact and we are persuaded by the analysis of the Judge in the case of Mwamboje (supra) that the burden of proof is on the claimant.”



In the case of *Rodgers Mwamboje v Douglas Mwamboje* 2014 eKLR which the Court of Appeal was referring to in the above passage, the judge had made the following observations:

“In my view, where a relative like a brother, a sister, a father, a mother, or even an uncle lives on one’s land, unlike in a case of a stranger, there is a rebuttable presumption that consent (sic) has given consent. The burden of proving that the consent or permission was not given will be on the person claiming the relatives land by virtue of adverse possession”.

22. I do not see a complete caveat issued by the Court of Appeal to the effect that a claim for land by adverse possession cannot be maintained as between families. All I can discern from the case of *Samuel Kihamba -v- Mary Mbaisi* (supra) is that the Court must tread with “extreme caution” while considering such claims among family members. Further, that the issue of consent must be carefully considered and that while there is a rebuttable presumption that consent to occupy land will have been given among family members, the burden will be on the person claiming the land by virtue of adverse possession. I am also cognizant of the fact that Section 38(1) of the *Limitation of Action Act* which allows a party to approach the Court for orders in adverse possession does not suggest that such a claim cannot be maintained between family members. I take the view that each case must be determined on the basis of it’s own peculiar circumstances noting the rider to “take extreme caution”.

23. I am further emboldened in that view by the fact that the same Court in two previous cases namely *John Ojiambo v Veronica Ojiambo & Others* 2013 eKLR as well as in *Eunice Karimi Kibunja v Mwirigi Kibunja* 2013 eKLR had allowed claims to land by way of adverse possession in disputes involving family members. In the former case, the dispute involved a son and his step-mother and step brother while in the latter case the dispute was between cousins. I am satisfied, and make a finding in response to paragraph 8 of the Defendant’s replying affidavit, that a claim to land by way of adverse possession can be maintained even in disputes involving families.

24. Having said so, the Plaintiff’s claim to the suit land is that not only have they lived thereon for close to 40 years but that they have also buried their parents and grandmother thereon. That occupation of part of the suit land by the Plaintiff was not really denied by the Defendant who in paragraphs 6, 7 and 11 of her replying affidavit, deponed that:

6. “The Applicants are my nephews as their grandmother was inherited by my father.

7. That as close relatives we stay together.

11. That the Applicants do not know on what portion of my father’s original land they reside on”.

Clearly therefore, the Plaintiffs’ occupation of part of the suit land is not really in dispute. It is also evident from the record that not only were the Plaintiffs born on the suit land on which they reside but further, that the Defendant vacated it and moved back later long after the statutory period to sustain a claim for adverse possession had elapsed. Their stay on the land has been peaceful, continuous uninterrupted and without the consent of the Defendant but with her knowledge. Applying the caution as set out in the case of *Samuel Kihamba -v- Mary Mbaisi* (supra), and also guided by the cases of *Rodgers Mwamboje* (supra) and *Eunice Kibunja* (supra), I am persuaded that a claim to the suit land by way of adverse possession is justified.

25. I would also go further to add that guided by the case of *Odd v Mubia* 1974 EA 476 where it was held that a Court may base it’s decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court to decide. That decision was also affirmed in the case of *Vyas Industries v Diocese Of Meru* 1982 KLR 114.



26. As is clear from the Defendant's own admission, the parties are related. The Defendant says in paragraph 8 of her replying affidavit that they are nephews. She also concedes that they all live on the suit land which means the land was ancestral land. That is sufficient evidence upon which this Court can make a finding that the Defendant holds the suit land in trust for herself and the Plaintiffs.
27. The suit land measure 4.8 Hectares which is (4.8 x 2.47) 11.8 acres. The Defendant stated that the Plaintiffs do not know what portion of the suit land they occupy. The Plaintiffs on their part raised in paragraph 4 of their Originating Summons for determination, the issue;

“Whether mutation should be done for a defined portion of Samia Butabona/836 and registration be done accordingly.”

That is clear evidence that none of the parties can tell with certainty what the other party occupies although such occupation is not disputed. I am satisfied that there is sufficient evidence to justify orders in both adverse possession and customary trust. I shall determine the trust by directing that the Defendant be entitled to 3.8 acres and the Plaintiffs to 8.0 acres.

28. Ultimately therefore, there shall be judgment for the Plaintiffs as against the Defendant in the following terms:
1. The Defendant holds the land parcel No Samia/butabona/836 in trust for both herself and the Plaintiffs.
 2. The trust is hereby determined as follows:
 - a. The Plaintiffs shall be jointly registered as proprietors of 8.0 acres.
 - b. The Defendant shall be registered as proprietor of 3.8 acres.
 - c. The Defendant shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed for the land parcel No Samia/butabona/836 and execute all documents for cancellation and issuance of new titles to the parties as decreed in 2(a) and 2(b) above.
 3. The Land Registrar Busia and the County Surveyor shall thereafter demarcate the land parcel No Samia/butabona/836 to register the parties as above and ensure that as much as possible, the parties are registered as proprietors of the portion which they currently occupy.
 4. In default of 2(c) above, the Land Registrar Busia shall be at liberty to issue new titles as above notwithstanding the absence of the original title to the land parcel No Samia/butabona/836 and the Deputy Registrar shall execute all relevant documents on behalf of the Defendant.
 5. As the parties are family each shall meet their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 11TH DAY OF MAY 2023 BY WAY OF ELECTRONIC MAIL.

Right of Appeal

BOAZ N. OLAO

JUDGE

11TH MAY 2023

