



**Ongombe & 2 others v Mingili (As administrator of the Estate of Mingili Auma) & 2 others
(Environment & Land Case 2 of 2018) [2023] KEELC 18936 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 2 OF 2018**

**BN OLAO, J
JULY 19, 2023**

BETWEEN

**JACINTA AKUMU ONGOMBE 1ST APPLICANT
SEBASTIAN OKELO WANGOMBE 2ND APPLICANT
GODFREY WANGOMBE 3RD APPLICANT**

AND

**CHRISPINUS ODHIAMBO MINGILI (AS ADMINISTRATOR OF THE ESTATE
OF MINGILI AUMA) 1ST RESPONDENT
PETRONILA OKWERO (AS TRUSTEE FOR JULIUS JUMA AND DENIS
ODUORI ONYANGO) 2ND RESPONDENT
DANIEL ONYANGO ODUORI 3RD RESPONDENT**

JUDGMENT

1. Jacinta Akumu Ongombe, Sebastian Okello Wangombe and Godfrey Wangombe (the 1st, 2nd and 3rd plaintiffs respectively) are a mother and her sons. They are also the widow and sons of one Dominic Ongombe. They approached this Court by way of their Originating Summons dated 10th January 2018 seeking against Chrispinus Odhiambo Mingili, Petronila Okwero and Daniel Onyango Oduori (the 1st, 2nd and 3rd defendants respectively) the main order that they have acquired by way of adverse possession the whole of the land parcel No Marachi/Elukongo/2942 measuring 2.48 Hectares and a portion of the land parcel No Marachi/Elukongo/2943 measuring 1.88 Hectares (the suit land) both being subdivisions of the land parcel No Marachi/Elukongo/1348 which measured 15.5 acres. They therefore sought a determination of the following questions:
 - a. Whether the plaintiffs have been in quiet possession of land measuring 8 acres out of land parcel No Marachi/Elukongo/1348 measuring 15.5 acres and now sub-divided into land parcels No



Marachi/Elukongo/2941 measuring 2.0 Hectares, Marachi/Elukongo/2942 measuring 2.48 Hectares and Marachi/Elukongo/2943 measuring 1.42 Hectares for a period exceeding 12 years.

- b. Whether the defendant's title to the 8 acres out of land parcel No Marachi/Elukongo/1348 and now known as No Marachi/Elukongo/2942 6.12 acres and 2 acres out of No Marachi/Elukongo/2943 became extinguished upon the expiry of 12 years from the time the plaintiffs went into possession of the said 8 acres of land i.e. from the year 1972.
 - c. Whether the plaintiffs have now acquired title to the said 8 acres of land by virtue of adverse possession.
 - d. Whether the registration of Petronila Okwero as trustee for Julius Juma and Denis Oduori Onyango as owners of land parcel No Marachi/Elukongo/2942 measuring 6.12 acres should be cancelled and the plaintiffs ordered to be registered as owners of land parcel No Marachi/Elukongo/2942.
 - e. Whether the registration of Daniel Onyango OduorI as owner of land parcel No Marachi/Elukongo/2943 measuring 3.5 acres should be cancelled and the plaintiffs be ordered to be registered as owners of 1.88 acres thereof.
 - f. Who should pay costs of the suit?
2. Arising out of the above questions, the plaintiffs sought judgment against the defendants in the following terms:
1. That the defendants' right over the land parcel No Marachi/Elukongo/2942 and 1.88 acres out of the land parcel No Marachi/Elukongo/2943 got extinguished by adverse possession upon the expiry of 12 years from the time the plaintiffs came into possession in 1972.
 2. That the whole of the land parcel No Marachi/Elukongo/2942 measuring 6.12 acres be registered in the names of the plaintiffs.
 3. That land parcel No Marachi/Elukongo/2943 measuring 3.5 acres be ordered to be subdivided and 1.88 acres be registered in the name of the plaintiffs and the balance of 1.62 acres be registered in the names of the 3rd defendant Daniel Onyango Oduor.
 4. That the 1st and 2nd defendants be ordered to execute all the relevant statutory documents required to facilitate the transfer of land parcel No Marachi/Elukongo/2942 into the name of the plaintiffs and in default, the Deputy Registrar of this Court do execute the same in place of the defendants.
 5. That the 1st and 3rd defendants be ordered to execute all the relevant statutory documents required of them to facilitate the transfer of 1.88 acres out of land parcel No Marachi/Elukongo/2943 to the plaintiffs and in default, the Deputy Registrar of this Court do execute the same in place of the defendants.
 6. The defendants, their family members, servants or agents and those claiming under or through them be permanently barred or inhibited from disposing, using or in any way interfering with the plaintiffs' possession and enjoyment of the said 8 acres of land.
 7. That the costs of this case be borne by the defendants.
3. The Originating Summons is supported by the 1st plaintiff's affidavit dated 10th January 2018 in which she has deposed, inter alia, that her late husband Dominic Ongombe purchased from the late Mingili



Auma a portion of land measuring 8 acres out of the land parcel No Marachi/Elukongo/1348 in 1972. That thereafter, she, her late husband and their six children took immediate possession of the said land on which they continue to reside. She and her late husband were blessed with five more children while on the said land and her late husband died in 1981 leaving her and the children thereon. Meanwhile, Mingili Auma also died in 1983 before transferring the 8 acres to the 1st plaintiff although she and her children still occupy the said land which is well delineated on the ground. That their occupation has been peaceful, open and without any dispute whatsoever.

4. However, the 1st defendant Chrispinus Odhiambo Mingili has since taken out a Grant of Letters of Administration in respect to the Estate of Mingili Auma and sub-divided the land parcel No Marachi/Elukongo/1348 into land parcels No Marachi/Elukongo/2941, 2942 and 2943. That the land which the plaintiff and his family now occupy is the whole of land parcel No Marachi/Elukongo/2942 and part of parcel No Marachi/Elukongo/2943 as shown on the mutation form. They have no claim over land parcel No Marachi/Elukongo/2941 and they have never received any demand notice to vacate the land which they occupy.
5. The plaintiff also filed supporting affidavits of the 2nd and 3rd plaintiffs dated 10th January 2018 in which they basically adopted their mother's affidavit adding that they are aged 44 years and 42 years respectively and were born on the suit land where they still reside.
6. The plaintiffs filed the following documents in support of their case:
 1. Copy of the Green Card for the land parcel No Marachi/Elukongo/1348.
 2. Copy of mutation form for the land parcel No Marachi/Elukongo/1348.
 3. Copy of Certificate of Official Search for the land parcel No Marachi/Elukongo/2942.
 4. Copy of Certificate of Official Search for the land parcel No Marachi/Elukongo/2943.
 5. Copy of mutation form for the land parcel No Marachi/Elukongo/2941.
 6. Copy of Certificate of Official Search for the land parcel No Marachi/Elukongo/3251.
 7. Copy of Sale Agreement dated 4th October 1978 between Dominic Ong'ombe and Mingili Auma.
 8. Acknowledgment slips dated 8th January 1972 and 31st August 1973.
 9. Acknowledgment slip dated 4th August 1978.
 10. Acknowledgment slip dated 6th December 1978.
 11. Letter dated 29th September 2014 from the Chief Marachi location addressed to the Chief Magistrate Busia High Court in reference to the land parcel No Marachi/Elukongo/1345.
 12. Copy of Certificate of Confirmation of Grant issued to Chrispinus Odhiambo Mingili in respect to the Estate of Gabriel Onyango Mingili in Nairobi High Court Succession Cause No 28 of 2002.
7. The Originating Summons is opposed by all the defendants. The 1st defendant is the son to the 2nd defendant and has been sued as the Administrator to the Estate of the late Mingili Auma. He filed a replying affidavit dated 7th May 2018 in which he deposed, inter alia, that the plaintiffs live on ½ acre of the land parcel No Marachi/Elukongo/1348 with the permission of his grandfather which was however withdrawn and they were asked to leave the said land to the 2nd and 3rd defendants. The 2nd and 3rd plaintiffs have since left the land but the 1st plaintiff continues to live on the ½ acre



without permission. That the land parcel No Marachi/Elukongo/1348 has since been sub-divided to create land parcels No Marachi/Elukongo/2941, 2942 and 2943 which are registered in the names of their rightful owners. That the plaintiffs have therefore not been in open, quiet, notorious and un-interrupted possession of the suit land because all efforts to have the 1st plaintiff vacate have been without success. The defendants' titles have not been extinguished in respect to the land parcels No Marachi/Elukongo/2941, 2942 and 2943 and the plaintiffs are not entitled to the orders sought as the 2nd defendant is registered as a trustee of the land parcel No Marachi/Elukongo/2942 for the benefit of her sons Julius Juma and Dennis Oduori Onyango who are beneficiaries thereof. The 3rd defendant on the other hand is a purchaser and holds title to the land parcel No Marachi/Elukongo/2943 to which the plaintiffs have no legitimate and lawful claim. That neither his deceased grandfather Petro Mingili Auma nor any other member of the Mingili family sold land to the plaintiffs or any other person other than the 3rd defendant. Therefore, this Originating Summons is an attempt by the plaintiffs to unjustly benefit from the defendants property. The doctrine of adverse possession does not apply and this suit should be dismissed and the plaintiffs ordered to vacate.

8. The 2nd defendant swore a replying affidavit dated 7th May 2018 confirming that she is the mother to the 1st defendant. She added that she holds the title to the land parcel No Marachi/Elukongo/2942 in the trust for her other sons Julius Juma and Dennis Oduori Onyango which they utilize without any interference.
9. The 3rd defendant also swore a replying affidavit dated 7th May 2018 to the effect that he has been in open, continuous and un-interrupted occupation of the land parcel No Marachi/Elukongo/2943 from 2001 when he purchased it. He added that at no time have the plaintiffs claimed a portion of the said land.
10. In another affidavit dated 9th September 2019, the 3rd defendant deposed, inter alia, that on or about August 2001, he purchased from Gabriel Onyango Mingili a parcel of land measuring 1.5 acres out of the land parcel No Marachi/Elukongo/1348. Thereafter, the said Gabriel Onyango Mingili Filed Busia High Court Succession Cause No 28 of 2002 wherein his interest was recognised as a liability. He started utilizing the said land but Gabriel Onyango Mingili died before the succession proceeding were completed. The family of Mingili then approached him and requested if he could purchase another portion measuring 1½ acres to enable them meet the funeral budget. He accepted to do so after the 1st plaintiff refused that offer saying she did not need land. He therefore entered into another agreement with the 1st defendant for the purchase of 1½ acres making his whole entitlement 3 acres. It is therefore strange for the plaintiffs to claim his land parcel No Marachi/Elukongo/2943 knowing very well how he purchased it and that he has been the one utilizing it. Therefore, the plaintiffs have no right to any portion of the land parcel No Marachi/Elukongo/1348.
11. The defendants also filed affidavits as well as statements of their witnesses Julius Juma Onyango (dw4) And Francis Owako Povanda (DW5).
12. In his statement dated 9th September 2019, Julius Juma Onyango (DW4) states that the 1st defendant is his brother, the 2nd defendant is his mother and the 3rd defendant is his neighbour. That he was given the land parcel No Marachi/Elukongo/2942 following the succession process of his late father's Estate but since he was still a minor, the land is held in trust by his mother. The land parcel No Marachi/Elukongo/2942 is therefore his inheritance and nobody can claim it.
13. On his part, Francis Owako Povana (DW3) swore an affidavit dated 2nd March 2021 confirming that he knows all the parties in this case.



14. That in 1971, he saw Dominic Ongombe approach Mingili Auma with a request for a portion of land which he could lease. That he was present when Mingili Auma partitioned a portion measuring ½ acre for Dominic Ongombe who had been posted as a teacher to a nearby school but had no place to live. Later when Gabriel Onyango came home from Kericho, he wanted to know why Dominic Ongombe had put up a home on their land and Mingili Auma explained to him that he had leased the land. That after the death of both Mingili Auma and Dominic Ongombe, Gabriel Onyango did not go back to Kericho. Instead, he filed for succession of Dominic Ongombe's Estate and when he approached the 1st plaintiff for some money so that he could include her as a beneficiary, she said she had no money. Meanwhile, Gabriel Onyango sold a portion of the land to the 3rd defendant but died before completing the succession process. The 1st defendant then approached the 1st plaintiff and asked her to pay some money for the land which she occupies to assist in funeral expenses but the 1st plaintiff refused saying she is not interested in the land. It was then that the family of Gabriel Onyango approached the 3rd defendant who agreed to buy another portion of land to help defray the funeral expenses. It is not therefore true that the plaintiffs utilize more than 1½ acres of land and further, there was no sale agreement between Mingili Auma and Dominic Ongombe for the purchase of land. Instead, there was only a lease agreement between the two for ½ acre which Dominic Ongombe paid for in the form of two heads of cattle. Therefore, if the plaintiffs want justice, they should pay the 1st and 2nd defendants some little amount of money being the value of land which they are occupying or vacate since the agreement between Mingili Auma and Dominic Ongombe expired when the latter died.
15. The defendants filed the following documents in support of their case:
 1. Grant of Letters of Administration issued to Gabriel Onyango Mingili in respect to the Estate of Mingili Auma vide Busia H. C. Succession Cause No 28 of 2002.
 2. Application for substitution by Chrispinus Odhiambo Mingili in place of Gabriel Onyango Mingili.
 3. Copy of sale agreement dated 28th August 2001 between Daniel Onyango Oduor I and Gabriel Onyango Mingili for 1½ acres out of land parcel No Marachi/Elukongo/1348.
 4. Copy of sale agreement dated 21st May 2002 between Chrispinus Odhiambo Mingili as vendor and Daniel Onyango Oduor I as purchaser for 3 acres of land out of land parcel No Marachi/Elukongo/1348.
 5. Copy of Certificate of Search in respect of land parcel No Marachi/Elukongo/2943.
16. The hearing commenced before Omollo J on 11th February 2021. The 1st plaintiff was the first witness who testified in support of the plaintiffs' case. She told the Court that the 2nd and 3rd plaintiffs who are her sons could not attend court to testify as they were engaged in school (2nd plaintiff) and at work (3rd plaintiff). She adopted as her evidence the contents of her supporting affidavit and also produced her documents filed herein vide the list of documents dated 4th March 2020.
17. After the 1st plaintiff had testified and at the request of counsel for the defendants, an order was made by consent that the Deputy Registrar visit the suit land. The visit was conducted by both the Deputy Registrar Hon. P. Y. Kulecho and the County Surveyor Busia's representative one James Olima Onyinkwa. Both filed separate reports. The Deputy Registrar's report is un-dated but that of MR. James Olima Onyinkwa signing on behalf of the County Surveyor Busia is dated 7th July 2021.
18. James Olima Onyinkwa (PW2) testified on behalf of the plaintiffs. He did not identify himself but since he signed the report dated 7th July 2021 on behalf of the County Surveyor Busia, it is safe to



assume that he is a surveyor in Busia County because in his oral testimony, he states how he visited the suit land in the company of the Deputy Registrar pursuant to an order of this Court. He told the Court that as a result of his visit, he found that the 1st plaintiff has a homestead on the land parcel No Marachi/Elukongo/2942 while Julius Juma Onyango also does some farming thereon.

19. The three defendants testified before me and called as their witnesses Julius Juma Onyango (DW4) and FRANCIS Owako Povana (DW5). They too adopted as their testimony the contents of their affidavits/statements which I have already referred to above. They also produced as their documentary evidence the documents which I have already referred to above.
20. Submissions were thereafter filed both by Mr Juma instructed by the firm of J. V. Juma & Company Advocates for the plaintiffs and by Mr Mutoka instructed by the firm of Shivachi Mutoka & Company Advocates for the defendants.
21. I have considered the evidence by the parties and the submissions by counsel.
22. The plaintiffs' case is that they have acquired by way of adverse possession the whole of the land parcel No Marachi/Elukongo/2942 which measures 6.12 acres and a portion measuring 1.88 acres out of the land parcel No Marachi/Elukongo/2943. Their claim is that the late Dominic Ongombe (husband to the 1st plaintiff and father to the 2nd and 3rd plaintiffs) purchased from the late Mingili Auma a portion of land measuring 8 acres from the original land parcel No Marachi/Elukongo/1348 which they have occupied since 1972 and which has since been sub-divided to give rise to the land parcels No Marachi/Elukongo/2941, 2942 and 2943. That they have done so peacefully, openly and without any dispute. The 1st defendant's case is that in fact the plaintiffs only occupy a portion of land measuring 1½ acre and with her permission which has since been withdrawn. The 2nd defendant's case is that she resides in the land parcel No Marachi/Elukongo/2942 which she holds in trust for her two sons Julius Juma and Dennis Oduor Onyango while the 3rd defendant's case is that he purchased the land parcel No Marachi/Elukongo/2943 in 2001 and has remained in open, continuous and un-interrupted occupation of the same since then.
23. Section 38 (1) of the Limitations of Actions Act provides that:

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."

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 the 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. 213 of 1996.

24. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal held as follows with regard to proof of a claim for land by way of adverse possession:

"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* (no 2) 1984 KLR 284."



Adverse possession is a fact to be observed upon the land itself – *Maweu -v- Liu Ranching & Farming Co-operative Society Ltd* 1985 KLR 430. The possession of the land must not be by force nor secrecy and it must be without the permission of the owner – *nec vi, nec clam, nec precario* – *Kimani Ruchine -v- Swift Rutherford Co Ltd* 1980 KLR 10. In *Robert Shume & Others -v- Samson Kazungu Kalama* 2015 eKLR, the Court added that for one to acquire land by way of adverse possession, such possession must be open, continuous, peaceful, notorious and with the knowledge but without the permission of the owner.

25. In *Mtana Lewa -v- Kahindi Ngala Mwangandi C.a. Civil Appeal No 56 of 2014* [2015 eKLR], the Court of Appeal described the concept of adverse possession in the following terms:

“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 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.”

The plaintiffs’ case is that in 1972, Dominic Ongombe the 1st plaintiff’s husband and also father to the 2nd and 3rd plaintiffs purchased 8 acres from the late Mingili Auma out of the land parcel No Marachi/Elukongo/1348 and took immediate possession. It is common ground that the said land parcel No Marachi/Elukongo/1348 measuring 15.5 Hectares was first registered in the name of Mingili Auma on 8th October 1967 as the first registered owner. The register shows that on 4th March 2004, it was registered in the name of the 1st defendant and subsequently following succession proceedings, it was transmitted as follows:

1st defendant – 5 ½ acres

2nd defendant – 6 ½ acres to hold in trust for Julius Juma and Denis Oduori.

The title was later closed on 23rd January 2006 following sub-division to create land parcels No Marachi/Elukongo/2941, 2942 and 2943. The parcel No Marachi/Elukongo/2941 is not the subject of this suit. Parcel No Marachi/Elukongo/2942 is registered in the name of the 2nd defendant as trustee while Marachi/Elukongo/2943 is registered in the name of the 3rd defendant who is a purchaser. During the plenary hearing, the 1st defendant said the plaintiff only occupies ½ acre out of the land parcel No Marachi/Elukongo/2942 while the 2nd defendant could only say the 1st plaintiff occupies a portion of the said land. The plaintiffs’ case is that they occupy the whole of the land parcel No Marachi/Elukongo/2942 measuring 6.12 acres and a portion measuring 1.88 acres out of the land parcel No Marachi/Elukongo/2943.

26. Possession is a matter to be confirmed on the land itself and as stated earlier, on 11th February 2021, the Court acting on an application by Mr Mutoka counsel for the defendants, directed that the Deputy Registrar visits the land in dispute and files a report. The site visit was subsequently carried out by the County Surveyor Busia and the Deputy Registrar Hon. P. Y. Kulecho. Her report is not dated and is headed:

“Site Visit Report Of L.r Number Marachi/Elukongo/1348 Sub-divided Into L.r NOS Marachi/Elukongo/2942 and 2943.



After detailing the observations made on site together with the SURVEYOR, the report makes the following conclusions:

“From the site visit, the following conclusions were drawn:

- a. The homestead belongs to Jacinta Akumu Ong’ombe and it measures approximately 1¼ acres.
- b. The maize cultivation that one of the Respondents Julius Juma Onyango claims as his measures approximately 2 acres and it has arrow roots, maize and grown eucalyptus trees. Jacinta claims she is the one who planted the trees and has been in occupation thereof until this year when the Respondents forcefully cultivated the same and planted the maize and arrow roots among the grown trees.”

On the other hand, the report by the County Surveyor Busia is dated 7th July 2021 and is headed:

“RE: Surveyor’s Report On Ground Ownerhsip On Part Of Parcel Number: Marachi/Elukongo/2942 – OS 02/2018.”

After making reference to the purpose of the site visit, the surveyor makes the following observations:

“The following were observed during the visit:A homestead with maize cultivation upto a line of mature grevillea trees at its western edge.A maize plantation from this edge up to a stream at the most western end of the parcel where some grown up eucalyptus trees were witnessed. There are no buildings on this portion.”

The surveyor then makes the following findings:

“From the survey exercise, the following was realized:The homestead belongs to Jacinta Akumu Ongombe and it measures 0.5 Hectares.The maize cultivation is being carried out by Julius Juma Onyango and it measures 0.70 hectares.

At this point also note that Jacinta Akumu Ongombe lays claim on the portion being utilized by Julius Ouma Onyango with assertion that she was initially using the land and that the eucalyptus trees at the stream were planted by her before she was barred from accessing the land.

The portion currently occupied by Jacinta Akumu Ongombe is not in contention.

Attached is a drawing showing the parcel of land and the said two sections for your information and further necessary actions.”

27. As clear from the two (2) reports, the un-dated report by the Deputy Registrar Hon. P. Y. Kulecho is headed “Site Visit Report Of L.r Number Marachi/Elukongo/1348, Sub-divided Into Lr Nos



Marachi/Elukongo/2942 & 2943.” However, it is not clear from the body of the report, and the final conclusions, on which parcel of land the homestead belonging to Jacinta Akumu Ongombe and which measures 1¼ acres is situated. On the other hand, the report by the County Surveyor Busia is clearly headed as report on the ground ownership on part of parcel No Marachi/Elukongo/2942. Since the report by Hon. P. Y. Kulecho indicates that the homestead of Jacinta Akumu Ongombe occupies approximately “1¼ acres” while the report by the County Surveyor indicates that it measures “0.5 Hectares” which translates to 1.24 acres [0.5 x 2.47], I am satisfied that both reports must have been in reference to the land parcel No Marachi/Elukongo/2942 who is registered in the name of the 2nd defendant and who holds it in trust for her sons Julius Juma and Dennis Oduori Onyango.

28. The occupation of a portion of the land parcel No Marachi/Elukongo/2942 by the 1st plaintiff is not really in dispute. In his replying affidavit dated 7th May 2018 and which he adopted as his evidence during the trial, the 1st defendant deposed at paragraph 4 as follows:

4: “That I also know the Applicant in this case mother and sons who live on ½ acre of our land L.R Marachi/Elukongo/1348 with permission of my grandfather which permission was withdrawn and required to leave the said portion for the 2nd and 3rd Respondents herein.”

The land parcel No Marachi/Elukongo/1348 of course does not exist having been subdivided to create land parcels No Marachi/Elukongo/2941, 2942 and 2943. Therefore, it can only be that when the 1st defendant refers to the plaintiff and her sons as occupying ½ acre, he could only have meant ½ acre on the land parcel No Marachi/Elukongo/2942. I say so because when he was led in his evidence in chief by Mr Mutoka, he said:

“The 2nd defendant is my mother. She utilizes the whole of land parcel No Marachi/Elukongo/2942. That includes the portion of land claimed by the plaintiffs in this case. My mother utilizes the whole of land parcel NO 2942 except the portion which the plaintiff is utilising.”

29. On her part, the 2nd defendant also said the following when she was led by Mr Mutoka in her evidence in chief:

“I was married in 1984. When I was married, I found the 1st plaintiff living on the land parcel No Marachi/Elukongo/2942. The 1st plaintiff is only occupying a portion of the said land.”

In his evidence in chief, Julius Juma Onyango (DW4) a son to the 2nd defendant, said:

“My father had the land which we now utilize. It was originally Marachi/Elukongo/1348 but it has now been sub-divided to give rise to Marachi/Elukongo/2941, 2942 and 2943. It is true that the plaintiff utilizes about ½ an acre.”

When he was cross-examined by Mr Juma he said:

“It is not true that it was the 1st plaintiff who planted the trees. I confirm that the 1st plaintiff has grown some trees on the parcel No Marachi/Elukongo/2942. But she does not utilize all of it.”

30. Similarly, when he was cross-examined by Mr Juma, Francis Owako Povana (DW5) stated that the 1st plaintiff only utilizes ½ an acre of the suit land although he admitted that he had not actually measured the size of the land.



31. It is clear from the above as read together with the report by the Deputy Registrar and the County Surveyor, that the homestead of the 1st plaintiff occupies 1¼ acres out of the land parcel No Marachi/Elukongo/2492. The assertion by the defendants that the 1st plaintiff's homestead only occupies ½ acre cannot be relied upon because they did not measure the said portion. This Court must therefore rely on the said reports that the 1st plaintiff's homestead sits on 1¼ acres of the land parcel No Marachi/Elukongo/2492.

32. That brings us to the other portion measuring 0.70 Hectares in the land parcel No Marachi/Elukongo/2492 which had a maize crop and which, according to the County Surveyor's report, is being claimed by Julius Ouma Onyango but which the 1st plaintiff says she has been utilizing and even planted trees thereon before she was barred from accessing it. She however claims the portion of land upto where the trees are growing. When she was cross-examined by Mr Mutoka, the 1st plaintiff said:

“I have trees upto the river. Daniel Onyango (3rd defendant lives on the upper part.”

As already stated above, when the 2nd defendant's son Julius Juma Onyango (DW4) was testifying, he blew hot and cold on this issue. He said, if I may quote him again:

“It is not true that it was the 1st plaintiff who planted the trees. I confirm that the 1st plaintiff has grown some trees on the land parcel No Marachi/Elukongo/2942. But she does not utilize all of it.”

33. It must be remembered that the plaintiffs claim the suit land by virtue of having taken occupation and possession following a land sale agreement between Dominic Ongombe and Mingili Auma executed way back on 4th October 1978. It is common knowledge that trees do not grow over-night. When she testified before Omollo J on 11th February 2021, the 1st plaintiff said:

“I have trees upto the river.”

From the totality of the evidence herein, I am persuaded that the maize and trees on the portion of the land parcel No Marachi/Elukongo/2942 also belongs to the plaintiffs and not to the 1st and 2nd defendants. And the only reason why the plaintiffs were able to cultivate and plant trees on the 0.7 Hectares without any interference from the 1st and 2nd defendants is because they (1st and 2nd defendants) recognized that the plaintiffs were in occupation and possession of the 0.70 Hectares by right having dispossessed the 1st and 2nd defendants of the same following the sale agreement having fully paid the purchase price. If that was not the case, then Mingili Auma who died in 1983 would have evicted the plaintiffs from that portion of the land. Although the 1st defendant has suggested in paragraph 4 of his replying affidavit, which I have already cited above, that the plaintiffs have been living on the suit land “with permission of my grandfather which permission was withdrawn and required to leave the said portion for the 2nd and 3rd Respondents herein,” there is no evidence to suggest that the plaintiffs' occupation and possession of the suit land was ever interrupted by any legal action to disposes them of the same.

34. Cultivation of land is sufficient evidence to prove adverse possession – Gatimu Kinguru -v- Muya Gathangi 1976 – 80 KLR 317. On the issue that the plaintiffs' occupation and possession of the land which they claim was with the permission of the registered proprietor which permission was withdrawn and they were asked to vacate, what was required of the defendants and, before them, their predecessors in title, was to assert their right by taking legal action to evict the plaintiffs therefrom – Njuguna Ndatho -v- Masai Itumo & Others 2002 eKLR. See also Githu -v- Ndeete 1984 KLR 776.



Neither of the defendants nor Mingili Auma took any such action against the plaintiffs or Dominic Ongombe. And since the said Dominic Ongombe entered the suit land following the sale agreement dated 8th January 1972 and completed paying the purchase price on 4th December 1978 as per the documents filed herein, it is clear that by 4th December 1990, the 2nd defendant's interest in the portion of land parcel No Marachi/Elukongo/2942 being claimed by the plaintiffs had long been extinguished by operation of the law. Indeed by the time this suit was filed on 16th January 2018, their occupation and possession of the said land was 40 years way beyond the statutory period of 12 years which entitled them to claim the same by way of adverse possession. And that occupation and possession has been open, exclusive, peaceful, un-interrupted and with the knowledge of the 1st and 2nd defendants. Even if time is computed from 18th October 2005 when the original land parcel No Marachi/Elukongo/1348 was registered in the names of the 1st defendant as Administrator to the Estate of Mingili Auma and the 2nd defendant as trustee for his sons Julius Juma (DW4)3 and Dennis Oduori Onyango, their titles had expired by the time this suit was filed on 16th January 2013. And although the 2nd defendant was only registered as proprietor of the land parcel No Marachi/Elukongo/2942 on 23rd June 2006, the law is that change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession – Githu -v- Ndeete (supra).

35. I am therefore satisfied from the evidence herein that the 1st plaintiff has proved her claim to a portion of the land parcel No Marachi/Elukongo/2492 by way of adverse possession. She admitted during her oral testimony that her sons the 2nd and 3rd plaintiffs reside on the land in dispute although her eldest children moved elsewhere. In paragraph 5 of her supporting affidavit, it is deposed as follows:

5: "That I, my husband and our 6 children took immediate possession and settled on the suit land and I and my co-Applicants still reside on the land."

From the certificate of official search in respect to the land parcel No Marachi/Elukongo/2942, it measures 2.48 Hectares (6.128 Acres). The plaintiffs are claiming the whole of that parcel of land. However, from the evidence of the County Surveyor James Onyinkwa (PW2) as contained in the report, I am satisfied that the plaintiffs only occupy the 0.5 Hectares where the homestead is situated and the 0.7 Hectares which is under cultivation which totals 1.2 Hectares and translates to 2.965 Acres and not the 6.12 Acres which they claim.

36. The plaintiffs similarly claim a portion of land measuring 1.88 acres out of the land parcel No Marachi/Elukongo/2943 which is registered in the name of the 3rd defendant and measures 1.42 Hectares (3.50 acres) as per the certificate of search. From the 3rd defendant's own affidavit dated 9th September 2019 he only purchased 3.0 acres of land from Gabriel Onyango Mingili out of the original land parcel Marachi/Elukongo/1348. It is clear from paragraphs 3 and 7 of that affidavit that he first purchased 1.5 acres from Gabriel Onyango Mingili vide an agreement dated 28th August 2001 and subsequently added another 1.5 acres following another agreement. In paragraph 10 of his affidavit, he adds:

10: "That we then combined the 1st agreement with the 2nd agreement to make the whole portion of land having been purchased by myself from the family of Mingili to be three (3.0) acres and the said agreement was drawn by the son of the 1st Applicant herein one Okubi Wangombe who was also witness and secretary in the 1st agreement of the 28/8/2001. Attached and marked DOO-3 is a copy of the said agreement."

37. The said sale agreements dated 28th August 2001 and 21st May 2002 confirm that in total, the 3rd defendant purchased 3.0 Acres out of the land parcel No Marachi/Elukongo/1348. As already stated in the preceding paragraphs of this judgment, both the Deputy Registrar of this Court as well as the



County Surveyor Busia appear to have confined their findings on the occupation and possession of the land parcel No Marachi/Elukongo/2942 which I have already determined above. No mention is made on the land parcel No Marachi/Elukongo/2943. When she was cross-examined by Mr Mutoka on 11th February 2021, the 1st plaintiff told the Court that the 3rd defendant took a portion of her land. This is what she said:

“Daniel Onyango (3rd defendant) lives on the upper part. I did not know when the 3rd defendant bought the suit land. The date of building a structure I did not know but I saw the structures land (sic). The 3rd defendant built on Mingili’s side. He took possession of my land.”

In his evidence in chief, the 3rd defendant said:

“I bought a portion measuring 1.42 Hectares out of the land parcel No Marachi/Elukongo/1348 which is now parcel No Marachi/Elukongo/2943. It is registered in my names. We did a sale agreement with Gabriel Mingili Onyango. The 1st plaintiff was living on the land parcel No Marachi/Elukongo/2943 but she did not ask me anything. She did not tell me it was her land but she was there. I do not live on the land. I only plough it.”

38. As is obvious from the 3rd defendant’s own admission, as corroborated by the sale agreements, he only purchased 3 Acres out of the land parcel No Marachi/Elukongo/1348. The certificate of search shows that what is registered in his name is land parcel No Marachi/Elukongo/2943 measuring 1.42 Hectares (3.50 Acres). In view of the 3rd defendant’s own admission that when he purchased the land parcel No Marachi/Elukongo/2943 vide the agreements dated 28th August 2001 and 21st May 2002, his entitlement was only 3.0 Acres and not 3.50 Acres comprised in that title and since by his own admission, the 1st plaintiff was already living on the said land, and considering that the Deputy Registrar and County Surveyor Busia made no findings on the occupation and possession of the land parcel No Marachi/Elukongo/2943, this Court can only be guided by the evidence of the 1st plaintiff and the 3rd defendant. And I am satisfied from the said evidence that by the time the 3rd defendant was registered as proprietor of the said land, the 1st plaintiff had been in occupation and possession of a portion thereof since 1972 openly, peacefully exclusively and without interruption by either Mingili Auma or any member of his family. Therefore, the 3rd defendant acquired the land parcel No Marachi/Elukongo/2943 subject to the overriding interest of the plaintiffs with respect to the portion which she was occupying then. The 1st plaintiff’s case is that she is entitled 1.88 Acres out of the land parcel No Marachi/Elukongo/2943. As is clear from the 3rd defendant’s own testimony which I have already referred to above, he concedes that the 1st plaintiff was already occupying a portion of the land parcel No Marachi/Elukongo/2943 when he (3rd defendant) purchased it. And since the 3rd defendant has not told the Court how much land the 1st plaintiff was occupying, this Court must find that the 1st plaintiff has proved that she occupies 1.88 Acres out of the land No Marachi/Elukongo/2943. The 3rd defendant has pleaded in paragraph 5 of his replying affidavit as follows:

5: “That indeed the 1st Applicant has admitted in her affidavit sworn by her on 18/1/2018 paragraph 18 that she does not claim any portion of land from my parcel of land.”

The averment is not correct because in the said paragraph 18 of her supporting affidavit, the 1st plaintiff deposed as follows:



18: “That I and my family have no claim over land shown as L.R Marachi/Elukongo/2941 on the mutation form annexed as ‘JAO-2’ as that was the land of Mingili Auma at the time of his death and part of L.R Marachi/Elukongo/2943.” Emphasis mine

39. It is clear from the above that what the 1st plaintiff was stating is that she has no claim over the land parcel No Marachi/Elukongo/2941 and part of Marachi/Elukongo/2943. In other words, she is not claiming the whole of the land parcel No Marachi/Elukongo/2943 but is only claiming a part of it. And that part is clearly identified in paragraphs 1 and 3 of the orders sought and which I shall cite again for avoidance of doubt as:

1: “That the Respondents right over L.R Marachi/Elukongo/2942 and 1.88 Acres out of L.R Marachi/Elukongo/2943 got extinguished by adverse possession upon expiry of 12 years from the time the Applicants came into possession in 1972.”

3: “That L.R Marachi/Elukongo/2943 measuring 3.5 Acres be ordered to be sub-divided and 1.88 Acres be registered in the names of the Applicants and the balance of 1.62 Acres be registered in the name of the 3rd Respondent Daniel Onyango Oduor.”

There can be no doubt, therefore, that with regard to the land parcel No Marachi/Elukongo/2943 registered in the name of the 3rd defendant, the plaintiffs were claiming a portion measuring 1.88 Acres which this Court finds to be well merited and proved. I must therefore make a finding in favour of the plaintiffs on that claim.

40. With regard to the claim against the 1st defendant, he is not the registered proprietor of the land parcels No Marachi/Elukongo/2942 and 2943 which are the subject of this suit. He was sued as the Administrator to the Estate of MINGILI AUMA the first registered proprietor of the original land parcel No Marachi/Elukongo/1348. That land no longer exists having been sub-divided to create land parcels No Marachi/Elukongo/2941, 2942 and 2943. A claim in adverse possession is directed against the registered proprietor of the land in dispute or his Administrator. The 1st defendant has no interest direct or otherwise, in the land parcels No Marachi/Elukongo/2942 and 2943 which are the subject of this suit. The claim against him must therefore be dismissed.

41. Ultimately therefore and having considered all the evidence in this suit, I make the following disposal orders:

1. The suit as against the 1st defendant is dismissed with costs.
2. There shall be judgment for the plaintiffs as against the 2nd and 3rd defendants in the following terms:
 - a. The plaintiffs have acquired by way of adverse possession a portion of land measuring 0.7 Hectares (2.965 Acres) out of the land parcel No Marachi/Elukongo/2942.
 - b. The 2nd defendant and cestui que trust’s interest in the portion measuring 0.7 Hectares (2.965 Acres) out of parcel No Marachi/Elukongo/2942 has been extinguished by operation of the law.
 - c. The plaintiffs have acquired by way of adverse possession a portion of land measuring 1.88 Acres out of the land parcel No Marachi/Elukongo/2943.
 - d. The 3rd defendant’s interest in the portion of land measuring 1.88 Acres out of the land parcel No Marachi/Elukongo/2943 has been extinguished by operation of the law.



- e. The 2nd and 3rd defendants shall within 30 days of this judgment surrender to the Land Registrar BUSIA the original title deeds to the land parcels No Marachi/Elukongo/2942 and 2943 for cancellation and execute all the relevant documents to facilitate the sub-division and registration of 2.965 Acres out of the land parcel No Marachi/Elukongo/2942 in the joint names of the plaintiffs and 1.88 Acres out of the land parcel No Marachi/Elukongo/2943 in the joint names of the plaintiffs.
- f. In default of (f) above, the Land Registrar BUSIA shall be at liberty to register the plaintiffs as proprietors of 2.965 Acres out of the land parcel No Marachi/Elukongo/2942 and 1.88 Acres out of the land parcel No Marachi/Elukongo/2943 in the joint names of the plaintiffs notwithstanding the absence of the original title deeds for the land parcels No Marachi/Elukongo/2942 and 2943 and the Deputy Registrar of this Court shall be at liberty to execute all the relevant documents on behalf of the 2nd and 3rd defendants.
- g. The 2nd and 3rd defendants shall meet the plaintiffs costs of this suit.

BOAZ N. OLAO

JUDGE

19TH JULY 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF JULY 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES. RIGHT OF APPEAL

BOAZ N. OLAO

JUDGE

19TH JULY 2023

