



**Ororo v Wabwire (Environment & Land Case 7 of 2016)
[2023] KEELC 18934 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18934 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 7 OF 2016**

**BN OLAO, J
JULY 18, 2023**

BETWEEN

CHARLES ODONGO ORORO APPLICANT

AND

MARTIN ASISI WABWIRE RESPONDENT

JUDGMENT

1. By a “home-made” Originating Summons dated December 28, 2015 and filed on February 2, 2016, Charles Odongo Ororo (the plaintiff herein then acting in person) sought a determination of the following issues as against Martin Asisi Wabwire (the defendant herein) with regard to the land parcel No Bukhayo/Bugengi/3836 (the suit land);
 - a. Whether or not the defendant has obtained letters of grant in respect of the Estate of Justo Abwire Ondiendie who died domiciled in Kenya sometime in 1993.
 - b. Whether or not the plaintiff had purchased one and a quarter acres out of the land parcel No Bukhayo/Bugengi/63 from the late Justo Abwire Ondiendie at a purchase price of Kshs 4,300.
 - c. Whether or not the late Justo Abwire Ondiendie had partitioned the said land parcel and given the plaintiff the land parcel No Bukhayo/Bugengi/3836.
 - d. Whether or not the Plaintiff has been in quiet, peaceful, unlawful and uninterrupted occupation of the land parcel No Bukhayo/Bugengi/3836 from 1987 to June 2015.
 - e. Whether or not the plaintiff’s occupation and use has matured into adverse possession.
 - f. Whether or not the plaintiff has acquired title to the land parcel No Bukhayo/Bugengi/3836 by way of adverse possession.
 - g. Whether or not the defendant should be condemned to pay costs of this suit.



2. The Originating Summons is supported by the plaintiff's affidavit also dated December 28, 2015 in which he has averred that by a sale agreement dated April 8, 1984 (the annexed agreement actually reads April 8, 1987) he purchased from one Justo Abwire Ondiendie (the defendant's deceased father) a portion of land measuring 1 acre out of the land parcel No Bukhayo/Bugengi/63 at a purchase of Kshs 3,100. Then sometime in 1987 after he had paid the purchase price, the deceased allowed him to start using the said portion of land and he built his home thereon.
3. On March 12, 1989, the deceased added him ¼ acre at a consideration of Kshs 1,200 which the plaintiff paid in full. Thereafter, the deceased sub-divided the land parcel No Bukhayo/Bugengi/63 into five portions being Bukhayo/Bugengi/3832, 3833, 3834, 3835 and the suit land whose number he gave the plaintiff promising to transfer the same into the plaintiff's name if he could facilitate the transfer process. Unfortunately, the deceased passed away in 1993 before the plaintiff had raised enough funds to facilitate the transfer process. The plaintiff however continued living on the suit land peacefully without any interruption from the defendant's family.
4. On July 20, 2010, the defendant maliciously and illegally trespassed into the suit land, up-rooted the boundary planted by the plaintiff and the deceased and threatened to evict him yet he is fully aware that the deceased had sold the suit land to the plaintiff. The plaintiff reported the incident to the Local Administrator who warned the defendant and on June 14, 2011, the plaintiff placed a restriction on the suit land to safeguard his interest. The defendant however secretly commenced succession proceedings and had the suit land transferred into his name yet the plaintiff had fully paid for it and has been in occupation thereof since 1987 and has therefore acquired it by way of adverse possession.
5. The plaintiff also filed a statement dated December 28, 2015 whose contents are basically a repeat of his supporting affidavit.
6. The plaintiff filed the following documents in support of his case:
 1. Chief's letter dated June 28, 2021.
 2. Copy of sale agreement dated April 8, 1987 (not 1984 as per the affidavit) – annexure COO-I.
 3. Copy of sale agreement dated March 12, 1989 – annexure COO-2.
 4. Copy of Certificate of Official Search for the land parcel No Bukhayo/Bugengi/3836 showing a restriction was placed thereon by the plaintiff on June 14, 2011 – annexure COO-3.

Although the plaintiff filed statements of his witnesses William Oyong Ogara and Consolata Achola, they did not testify during the plenary hearing.

7. In opposing the Originating Summons, the defendant filed a replying affidavit dated May 2, 2018 in which he confirmed that he is the registered proprietor of the suit land having acquired it by way of transmission from the deceased following Busia High Court Succession Cause No 204 of 2010. That the plaintiff did not challenge those succession proceedings. He added that his brother William Egesa is utilizing the suit land and denied that the plaintiff had purchased it or is utilizing it. He sought the dismissal of the Originating Summons with cost.
8. The defendant also filed the statement of his William Egesa Abwire (DW2) dated May 17, 2021 in which he states that he has been in occupation of the suit land since 1990 to-date cultivating it without interference from any party including the plaintiff. He too denied that the deceased had sold the suit land to the plaintiff adding that their efforts to get a copy of the sale agreement from the plaintiff have been fruitless. That it is the defendant who is entitled to the suit land.
9. The defendant filed the following documents in support of his case:



1. Copy of Certificate of Search in respect of the land parcel No Bukhayo/Bugengi/3836.
 2. Copy of Register for the land parcel No Bukusu/Bugengi/3836.
 3. Copy of the Certificate of Confirmed Grant issued to the defendant on February 14, 2014 in respect to the Estate of the deceased.
10. Although the plaintiff moved to court acting in person on February 2, 2016, the firm of Gacheche Wa Miano filed a Notice of Appointment to act for him on October 3, 2017. By the time the hearing commenced on the July 26, 2022, he was being represented by Ms Achala while Mr Were appeared for the defendant.
 11. The hearing commenced on July 26, 2022 when the plaintiff testified and adopted as his testimony the contents of his affidavit which I have already summarised above. He also produced as his documentary evidence the documents filed herein.
 12. The defendant testified on February 15, 2023 and he too adopted as his evidence the contents of his replying affidavit. He called as his witness his brother William Egesa Wabwire (DW2) who also adopted as his evidence, the contents of his statement dated May 17, 2021. The defendant also produced as his documentary evidence the documents annexed to his replying affidavit.
 13. Submissions were thereafter filed both by Ms Achala instructed by the firm of Abalo & Company Advocates for the plaintiff and by Mr Were instructed by the firm of Gabriel Fwaya Advocates for the defendant.
 14. I have considered the evidence by all the parties as well as the submissions by counsel.
 15. It is clear from the plaintiff's Originating Summons that he seeks a determination of two main issues ie:
 1. Whether he purchased 1¼ acres of land from the deceased out of the land parcel No Bukhayo/Bugengi/63.
 2. Whether he has acquired the suit land by way of adverse possession.

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* Ca Civil Appeal No 213 of 1996.

16. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal said the following with regard to proof of a claim in 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 must not be by force nor secretly and it should be without the permission of the owner – i.e *nec vi, nec clam, nec precario* - *Kimani Ruchine -v- Swift Rutherford Co Ltd* 1980 KLR 10. It must also be open, continuous, peaceful and notorious and with the knowledge but without the permission of the owner - *Robert Shume & Others -v- Samson Kazungu Kalama* 2015 eKLR.

17. And in *Mtana Lewa -v- Kabindi Ngala Mwangandi* Ca 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 he first purchased a portion of land measuring one acre from the deceased out of land parcel No Bukhayo/bugengi/63 vide a sale agreement dated April 8, 1987. Later, he purchased from the deceased ¼ acre and was allowed to take possession. However, the deceased passed away in 1993 without transferring the land to him and on July 20, 2010, the defendant trespassed onto the suit land created following the sub-division of the original land parcel No Bukhayo/Bugengi/63. The defendant has denied that there was any such sale agreement between the deceased and the plaintiff.

18. I have perused the documents filed herein and it is common ground that the suit land was created on January 6, 1993 following the sub-division of the original land parcel No Bukhayo/Bugengi/63. On June 14, 2011, the plaintiff placed a restriction on the suit land claiming a purchaser’s interest.
19. There is also a copy of a sale agreement dated April 8, 1987 between the plaintiff and the defendant showing that the plaintiff purchased a portion measuring one (1) acre out of the land parcel No Bukhayo/Bugengi/63 at a consideration of Kshs 3,500 of which he paid Kshs 3,100 on the same day leaving a balance of Kshs 400. Later on March 12, 1989, the parties executed another agreement by which the deceased sold to the plaintiff an additional ¼ acre and on July 29, 1989, there is an acknowledgement slip showing that the plaintiff had finalised paying the whole purchase price. And although the defendant denied the existence of the agreement or that the plaintiff purchased the suit land from the deceased, he went on to add that his deceased father did not involve him during the sale transactions. The sale agreements speak for themselves and they even have the deceased’s identity card No 0107xxx/63. Further, the plaintiff produced under his further list of documents a letter dated June 28, 2021 authored by his senior chief one Chrispinus O Mauda in support of his case. It is a short letter and due to it’s relevance, I shall reproduce it in extenso:

“28/6/2021

To whom it may concern,

Dear Sir/Madam,

REF: Charles Odongo Ororo Id No 668xxxx



I confirm that the above named person hails from Nasikina Village, Esikulu Sub-location Of Bukhayo West Location since 1987 when he bought a piece of land from the late Justo Abwire Adienda who also hailed from the same area of jurisdiction upto his death.

All copies of the land sale agreements are attached.

Please accord him necessary consideration.

Thank you.

Chrispinus O. Mauda

Senior Chief

Bukhayo West Location

Busia County

Date: 28/6/2021.”

It is a matter of local notoriety, and which this court can take judicial notice of under Section 60 of the *Evidence Act*, that chiefs and those who work under them would ordinarily know the people who live within their areas of jurisdiction. This particular chief has made it very clear in that letter that he has known the plaintiff “since 1987 when he bought a piece of land from the late Justo Abwire Ondiendia who also hailed from the same area of jurisdiction.” Indeed it is part of the responsibilities of chiefs to know residents of the areas which they oversee. The letter from the senior chief read together with the sale agreements between the deceased and the plaintiff clearly confirm that since 1987, the plaintiff has been in occupation and possession of the suit land. And although the defendant tried to suggest that it is his brother who is in occupation of the suit land, he only did so forcefully on July 20, 2010 when he up-rooted the existing boundary placed there by the deceased and also tried to evict the plaintiff. However, that could not have interrupted the plaintiff’s occupation and possession of the suit land because by 2010, the plaintiff had already been in occupation and possession of the suit land peacefully, extensively, openly and without interruption for 23 years which is well beyond the 12 years statutory period. There is nothing to suggest that the senior chief had any reason to lie when he wrote that the plaintiff is a resident of his area of jurisdiction from 1987 when he purchased the suit land from the deceased. If indeed it has always been the defendant’s brother William Egesa Wabwire (DW2) who utilises the land, the senior chief would have said so. I am satisfied that indeed it is the plaintiff who utilises the suit land since 1987 and by the time the defendant attempted to evict him therefrom in 2010, his title thereto had long been extinguished by effluxion of the law.

20. The law is that a claim for land by way of adverse possession can be made by a purchaser in possession after paying the purchase price – *Public Trustee -v- Wanduru* 1984 KLR 314. In his submissions, counsel for the defendant has sought to poke holes in the plaintiff’s evidence as to what exactly was the purchase price and the size of the land. It is true that in paragraph 3 of his supporting affidavit, the plaintiff deposed that he bought the suit land in 1984 and the purchase price was Kshs 3,100. However, the record of the proceedings before Omollo J on July 26, 2022 shows that when the plaintiff was cross-examined by Mr Were, he said:

“I purchased the land in 1987 not 1984. I finished pay (sic) the balance to the agreement of (sic) 1987.

In my statement, I said the purchase price was 3,100 but the correct figure of the purchase price is 3,500. I paid Kshs 3,100 and the balance of Kshs 400 paid later (no date).”



The plaintiff therefrom confirmed what is contained in the agreement dated April 8, 1987 that the purchase price was Kshs 3,500 of which he paid Kshs 3,100 leaving a balance of Kshs 400. Documents speak for themselves and the sale agreements dated April 8, 1987 and March 12, 1987 are self-explanatory and show that the plaintiff first purchased one (1) acre and later ¼ acre. In any case, if indeed the plaintiff did not pay any purchase price, the deceased would surely have claimed it or evicted the plaintiff from the suit land long before his demise in 1993. The fact that the deceased did neither is a clear affirmation that he was fully paid for the 1¼ acres by the plaintiff.

21. Counsel for the defendant has also submitted that there is no evidence of sale of any land out of the land parcel No Bukhayo/Bugengi/63. He has submitted thus:

“In sum, the plaintiff has failed to prove that there was a sale or purchase of 1¼ acre out of Lr Bukhayo/Bugengi/63 because of the following reasons ...

From the above reasons, we believe there was no sale of any portion of the original Bukhayo/Bugengi/63 to the plaintiff. If there was, the same does not constitute the current land parcel LR No Bukhayo/Bugengi/3836 being claimed by the plaintiff.”

The answer to the above can easily be found from the documents herein. The sale agreement dated April 8, 1987 clearly identifies the land as “63 Bugengi”. The register produced by the defendant also shows that the suit land is a sub-division of plot No 63. The register for the original plot No 63 was not availed but there can be no doubt that it was already recognised as the deceased’s property and assigned No 63 and that is why it was so captured in the sale agreement dated April 8, 1987.

22. The suit land itself was first registered in the deceased’s name on January 6, 1993. On January 4, 1999, the defendant’s brother William Egesa Wabwire (DW2) placed a restriction thereon pending the succession proceedings. That was lifted on March 24, 2011 but on June 14, 2011, the plaintiff placed his own restriction against the title claiming a purchaser’s interest. So, even if time for purposes adverse possession is computed from January 6, 1993, it is clear that by January 7, 2005, the deceased’s title had long been extinguished. The defendant’s counsel has submitted on this issue as follows:

“In Gabriel Mbui –v- Mukundia Maranga (supra) it was held that;

9: The rightful owner must know that he is ousted. He must be aware that he has been dispossessed.

The defendant herein could not, as the rightful owner, have known that he has been ousted as early as 1984 or 1987 or 1989 when in fact he was not the owner then as he had not been registered until 28/2/2014.

The statutory limitation period does not therefore apply against him.”

23. It is true that the defendant was only registered as the proprietor of the suit land on February 28, 2014. However, the mere change of ownership of the suit land from the deceased to the defendant in 2014 did not interrupt time for purposes of adverse possession – *Gitbu -v- Ndeete* 1984 KLR 776. And even by the time the defendant attempted to make a re-entry by trying to evict the plaintiff on July 20, 2010, it was rather late in the day as the defendant was by then a mere trustee holding the title to the suit land in trust for the plaintiff.
24. I am satisfied from the evidence that the plaintiff has since 1984 been in open, exclusive, peaceful and un-interrupted occupation and possession of the suit land with the knowledge of both the deceased and the defendant. His claim to be registered as the proprietor therefore by way of adverse possession is well merited. It must be allowed.



25. But that is not all. In my view, this is a clear case where this Court can rightly impose a constructive trust upon the defendant. Such a trust, as was held in the case of *Twalib Hatayan & Another -v- Said Saggar Ahmed Al Heidy & 5 Others* 2015 eKLR;

“... is an equitable remedy imposed by the Court against one who has acquired property by wrong doing ... it arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit. As earlier stated, with constructive trusts, proof of parties intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settler.

Imposition of a constructive trust is thus meant to guard against unjust enrichment”.

Emphasis mine

In *Black's Law Dictionary* 10th Edition, a constructive trust is defined as:

“An equitable remedy by which a Court recognises that a claimant has a better right to certain property than the person who has legal title to it.”

The same Dictionary goes on to add that only a trust is “the formula through which the conscience of equity finds expression.”

26. It is clear from all the above that where circumstances allow, the Court will “impose” a constructive trust. The term “impose” is defined in the *Concise Oxford English Dictionary* 12th Edition as:

“Force to be accepted, done or complied with.”

Clearly therefore, such a trust has nothing to do with the intention of the parties. Rather, it is dictated by the pervading conscience of equity. What then is the conscience of equity in the circumstances of this case?

27. During cross-examination by Ms Achala, the defendant admitted that he saw the sale agreement between the plaintiff and the deceased. However, he objects to it because he was not involved in the same. This is what he said:

“I heard the plaintiff's evidence. I saw the agreement which he produced that he purchased the land from my father. He did not involve me. I have not challenged the agreement”

He went on to add when cross-examined by Ms Achala that:

“I don't know if the plaintiff finished paying for the land. I saw the agreement but I was not a party to it. I object to the agreement. It is true that there are other persons who bought from my father and I have given them their portions.”

28. The defendant appears to suggest that the deceased was required to consult him before selling the suit land to the plaintiff. However, there is nothing to suggest that the deceased held the suit land in trust for the defendant. It was therefore his private property to dispose of the same as he wished. In any case, the defendant has himself admitted that prior to his death, the deceased had sold part of his land to other persons. The deceased having sold the suit land to the plaintiff during his lifetime and having received the purchase price, it would be inequitable to allow the defendant to deprive him of the same.



29. Secondly, the defendant well aware that the plaintiff had an interest in the suit land as a purchaser, went ahead to apply for the confirmation of the Grant in respect of the deceased's estate without disclosing the plaintiff's interest. Instead, he proceeded to have the suit land registered in his name by way of transmission simply because he did not recognise the sale agreement which his own father never disputed during his life time. When the plaintiff testified on July 26, 2022, he confirmed that he was kept in the dark about the succession proceedings and that is why he placed a restriction on the suit land.
30. Finally, it is clear from the copy of certificate of official search in respect to the suit land dated April 17, 2015 that the plaintiff had placed a restriction thereon on June 14, 2011, claiming a purchaser's interest. Surprisingly, a copy of the certificate of search for the same land produced by the defendant and dated November 6, 2014 does not reflect such a restriction. Having placed a restriction on the suit land, it could only have been removed by the Registrar after a notice had been issued to the plaintiff as the cautioner or by an order of the Court. That is clear from Sections 137 and 138 of the then Registered Land Act which was the applicable law in 2011 when the restriction was placed as well as Section 73 of the new Land Registration Act which was the law on February 28, 2014 when the restriction was lifted. There is no evidence showing that the Land Registrar issued any notice to the plaintiff before lifting the restriction or that any Court order was obtained by the defendant. As there was already a restriction on the suit land, it was incumbent upon the Land Registrar to seek clarification from the Court which issued the Confirmed Grant or notified the plaintiff because clearly, the Succession Court was kept in the dark about the status of the suit land. That was fraud which again no doubt calls upon this Court to intervene by declaring that the defendant is only a constructive trustee holding the title to the suit land in favour of the plaintiff.
31. With regard to the size of land which the plaintiff is entitled to, it is clear from the sale agreements that he actually contracted for a portion measuring $1\frac{1}{4}$ acres which is 0.5 Hectares. He has approached this court seeking adverse possession of the suit land which measures 0.4 Hectares. Although he has clearly been short-changed, this Court can only award him what he sought.
32. Ultimately therefore and having considered all the evidence herein, I enter judgment for the plaintiff against the defendant in the following terms:
1. The plaintiff has acquired the land parcel No Bukhayo/Bugengi/3836 by way of adverse possession.
 2. The defendant's interest in the land parcel No Bukhayo/Bugengi/3836 has been extinguished.
 3. The defendant shall within 30 days from the date of this judgment surrender to the Land Registrar the Original title deed for the land parcel No Bukhayo/Bugengi/3836 for cancellation and issuance of a new title deed in the name of the plaintiff.
 4. The defendant shall also within 30 days of this judgment execute all the relevant documents to facilitate the registration of the land parcel No Bukhayo/Bugengi/3836 in the name of the plaintiff.
 5. In default of (4) above, the Deputy shall be at liberty to do so on behalf of the defendant.
 6. The defendant shall meet the plaintiff's costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF JULY 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES. RIGHT OF APPEAL

BOAZ N. OLAO



JUDGE

