



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khaliango & another v Osodo (Environment & Land Case E037 of 2021)  
[2023] KEELC 21499 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E037 OF 2021**

**BN OLAO, J**

**NOVEMBER 15, 2023**

**BETWEEN**

**SIMON JUMA KHALIANGO ..... 1<sup>ST</sup> PLAINTIFF**

**MAGDALINE KANU OBUOLO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LIONEL NINDE OSODO ..... DEFENDANT**

**JUDGMENT**

1. Simon Juma Khaliango and Magdaline Kanu Obuolo (the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein) impleaded Lionel Ninde Osodo (the Defendant herein), through their Originating Summons dated 2<sup>nd</sup> July 2021 and filed on 6<sup>th</sup> July 2021 claiming to have acquired the land parcel No Bunyala/Bulemia/851 (the suit land) by way of adverse possession.
2. They sought a determination of the following questions:
  1. Whether the Plaintiffs have been in open, quiet and notorious possession of the land parcel No Bunyala/Bulemia/851 or any other title derived therefrom as on the ground for a period of over 20 years and 40 years respectively 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 Bunyala/Bulemia/851 has become extinguished upon expiry of 12 years from the time the Plaintiffs have been in possession since the year 2001 and 1980.
  3. Whether the Plaintiffs have acquired title to land parcel No Bunyala/Bulemia/851 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 Bunyala/Bulemia/851 and registration be done accordingly.
  5. Who should pay costs of the Originating Summons.
3. Arising from the above, the Plaintiffs sought judgment against the Defendant as follows:
1. That the Defendant's right over the land parcel No Bunyala/Bulemia/851 or any title derived therefrom as on the ground possessed by the Plaintiffs is extinguished by adverse possession from the time the Plaintiffs acquired same by virtue of purchase then possession and inheritance from the late Emmanuel Mbanda Otuke.
  2. That the Plaintiffs do and are hereby granted right of title of the land parcel No Bunyala/Bulemia/851.
  3. That the Defendant do execute all relevant documents necessary to mutate their respective portions as occupied on the ground and in default the Deputy Registrar be authorised to do so after expiry of a defined period.
  4. Costs be borne by the Defendant.
4. The Plaintiffs swore separate affidavits dated 2<sup>nd</sup> July 2021 in support of their case.
5. In his affidavit, the 1<sup>st</sup> Plaintiff deposed, inter alia, that in 2001, he purchased the suit land from Emmanuel Mbada Otuke and Pascal Obuolo Achuki as per copy of the sale agreement dated 8<sup>th</sup> December 2001 and annexed thereto. That when he purchased the land, it was No Bunyala/Bulemia/163 and he was allocated 0.1 hectares but on 18<sup>th</sup> June 2021 he learnt from the area Assistant Chief that the land which he has occupied for over 20 years is the suit land registered in the name of the Defendant and that the surveyor was in the process of correcting the boundary. That they have each been in possession of a portion of the suit land measuring 0.1 hectares peacefully, uninterrupted and continuously for over 12 years but the Defendant has now started disturbing them.
6. When he visited the Land Registry at Busia, he found that the Defendant had acquired the suit land in 2013 yet he had never informed the Plaintiffs. The Defendant is using the County Surveyor to disposes the Plaintiffs of the suit land and yet both of them have permanent houses thereon where they have lived all their life time and he has buried his wife there while the 2<sup>nd</sup> Plaintiff has buried her husband on the same. That all the relatives and neighbours regard him as the proprietor of a portion of the suit land measuring 0.1 hectares and the Defendant does not reside on the suit land and should therefore be restrained from interfering with it.
7. The 1<sup>st</sup> Plaintiff annexed the following documents to his supporting affidavit:
1. Copy of a sale agreement between the 1<sup>st</sup> Plaintiff and Emmanuel Mbanda Otuke for a portion of land out of parcel No Bunyala/Bulemia/163.
  2. Certificate of official search for the land parcel No Bunyala/Bulemia/851 showing the Defendant as the registered proprietor.

The 2<sup>nd</sup> Plaintiff recorded her statement also dated 2<sup>nd</sup> July 2021 in which she states that she is the widow of the late Pascal Obuolo Achuki whose remains are buried on the suit land. That the land was allocated to her and her late husband sometime in 1980 by their father Emmanuel Mbanda Otuke and they constructed a home where they have continued to reside to-date. That due to his illness, her late husband requested Emmanuel Mbada Otuke if he could sell part of his portion measuring 0.1 hectares to the 1<sup>st</sup> Plaintiff. That to her knowledge, she and her late husband took possession of the suit



land when it was still registered as parcel No Bunyala/Bulemia/163 and the said Emmanuel Mbada Otuke allocated them a portion where they lived until 18<sup>th</sup> June 2021 when the area chief informed them that a surveyor would be coming to determine a boundary dispute of which they were not aware. That the Defendant has never utilized or taken possession of the suit land where she has buried her late husband and her neighbours and relatives know them as the real owners of the portion of the suit land measuring 0.2 hectares. The Defendant and his agents should therefore be restrained from interfering with that portion which should be transferred to them.

8. Annexed to the 2<sup>nd</sup> Plaintiff's statements are the following documents:
  1. Certificate of official search for the land parcel No Bunyala/Bulemia/851.
  2. Notice of Intention to fix the boundary to the land parcel No Bunyala/Bulemia/851.
9. The Plaintiffs filed the affidavit of Fredrick Nanjala Mbanda (PW3) dated 1<sup>st</sup> April 2022. He states therein that he is a son to the late Emmanuel Mbanda Otuke and a neighbour to the Plaintiffs. He confirms that the 1<sup>st</sup> Plaintiff started living on the suit land in 2001 after purchasing it from his late father and also the late Pascal Obuolo Achuki the late husband to the 2<sup>nd</sup> Plaintiff. That the 2<sup>nd</sup> Plaintiff and the late husband started living thereon in 1980 and still live there to-date. That prior to his late father's demise, he never heard him complaining about the suit land and it was not until 2021 that the Defendant started claiming that the suit land belonged to him.
10. The witness annexed to his affidavit a copy of the sale agreement dated 8<sup>th</sup> December 2001 between his late father and the 1<sup>st</sup> Plaintiff.
11. The Defendant's brother Christain Simigini Osodo (DW1) was the only witness for the Defendant and testified on his behalf as a donee of a power of attorney.
12. He filed two (2) affidavits in opposition to the originating summons.
13. In the first affidavit dated 30<sup>th</sup> July 2021, he deponed, inter alia, that he is a younger brother to the Defendant who was gifted the suit land by their father Dr Osodo Okumu Bonface. The Defendant then had the land registered in his names and travelled to the USA in 2015 for further studies but upon his return in September 2020, he discovered that the same had been encroached upon. He therefore reported the issue to the area Assistant Chief who in turn wrote to the County Land Registrar to establish the boundaries and set up the beacons. A date was then set to establish the beacons and boundaries between the land parcel No Bunyala/Bulemia/851 vis a vis the land parcel No Bunyala/Bulemia/2237 and Bunyala/Bulemia/163 which are neighbouring parcel of land. But on the appointed date which was 16<sup>th</sup> November 2021, the County Surveyor did not turn up. That the Plaintiff's claim is in respect to the land parcel No Bunyala/Bulemia/163 which neighbours the suit land and this suit is misguided. Further, that the Defendant was only registered as the proprietor of the suit land on 7<sup>th</sup> November 2013 and so the 12 years have not elapsed. That the suit involves a land boundary dispute.
14. Annexed to the replying affidavit are the following documents:
  1. Copy of Power of Attorney donated to the witness.
  2. Certificate of official search for the land parcel No Bunyala/Bulemia/851 dated 3<sup>rd</sup> July 2013 in name of Dr Osodo Okumu Boniface.
  3. Certificate of official search for the land parcel No Bunyala/Bulemia/851 dated 17<sup>th</sup> September 2020 in Defendant's names.
  4. Copy of title deed for the land parcel No Bunyala/Bulemia/851 in name of the Defendant.



5. Letter by the Assistant Chief Bulemia Sub-Location dated 22<sup>nd</sup> September 2020 and addressed to the County Registrar Busia.
  6. Certificate of official search for the land parcel No Bunyala/Bulemia/2237 in the name of Teresa w/o Okumu.
  7. Certificate of official search for the land parcel No Bunyala/Bulemia/163 in the names of Odiombo Otuke, Mbanda Otuke and Otuke Odiombo.
  8. Notice of Intention to ascertain and fix boundary in respect to the land parcels No Bunyala/Bulemia/851, 2237 and 163.
  9. Receipts for Kshs.3,000 and 9,000 issued to the Defendant on 23<sup>rd</sup> September 2020 in respect of boundary dispute and survey fees.
15. Christain Simigin Osodo filed a further affidavit dated 12<sup>th</sup> April 2023 in which he averred that several attempts were made to the Land Registrar Busia to visit the site and determine the boundaries and he responded by a letter dated 18<sup>th</sup> January 2022 explaining why he could not do so. The Defendant therefore engaged a private valuer to establish the boundary and any developments on the suit land. From the report, there are no structures on the suit land and therefore the Plaintiffs' claim is misguided.
16. Annexed to the further affidavit are the following documents:
1. Letter dated 18<sup>th</sup> January 2022 from Land Registrar Busia addressed to the Defendant.
  2. Valuation Report on title No Bunyala/Bulemia/851 dated 16<sup>th</sup> July 2021.
- He also filed a list of documents dated 16<sup>th</sup> September 2022.
17. With the consent of both parties, the report dated 27<sup>th</sup> April 2023 by Mr Nicholas A Obiero the Land Registrar Busia was admitted as part of the evidence herein on 6<sup>th</sup> July 2023.
18. The dispute was heard on 28<sup>th</sup> February 2023 when both parties and the Plaintiffs' witness Fredrick Nanjala Mbanda (PW3) testified and closed their case. They adopted their respective affidavits and statements as their evidence and produced the various documents annexed thereto as their documentary evidence. The report by Mr Nicholas A. Obiero the Land Registrar Busia dated 27<sup>th</sup> April 2023 was by consent of the parties, admitted as part of the evidence.
19. Submissions were thereafter filed both by Mr Ouma instructed by the firm of B.m. Ouma & Company Advocates for the Plaintiffs and by Mr Emukule instructed by the firm of Emukule & Company Advocates for the Defendant.
20. I have considered the evidence by the parties both oral and documentary as well as the submissions by counsel.
21. The Plaintiff's claim is that they are entitled to the suit land by virtue of adverse possession having lived thereon for a period of over 20 years (in the case of the 1<sup>st</sup> Plaintiff and 40 years in the case of the 2<sup>nd</sup> Plaintiff) and that they are therefore entitled to be registered as proprietors thereof in place of the Defendant. It is not in dispute that the Defendant holds the title deed to the suit land issued to him on 8<sup>th</sup> November 2013. He acquired it as a gift from his father.
22. Before I delve into the merits of the Plaintiffs' claim, it is important that I address an issue raised by the Defendant which touches on this Court's jurisdiction. That is because, an issue touching on



jurisdiction must be determined as a first point of call because, as was held by Nyarangi Ja in *Owners Of The Motor Vessel 'Iillian S' v Caltex Oil (kenya) Ltd* 1989 Klr 1:

“Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

That is why an issue of jurisdiction ought to be raised even before trial as a Preliminary Objection. Though coming late, I must address it.

23. In his submission on that issue, counsel for the Defendant has submitted as follows picking up from the recommendation of the Land Registrar:

“In light of the recommendations made by the Land Registrar who was very clear that the claim before Court is a boundary dispute, we urge the Honourable Court to hold as much. Section 18(2) of the *Land Registration Act* is very clear on the jurisdiction of Court with reference to boundary disputes”

That matter was however conclusively determined by Omollo J in her ruling delivered on 3<sup>rd</sup> March 2022. She said:

“From the Applicant’s pleadings, the claim is for adverse possession which the respondent want to turn into a boundary dispute under a Preliminary Objection. I find that the Preliminary Objection as it does not raise pure points of law and this Court would require additional evidence to reach a conclusion whether the claim as presented is adverse possession or the parties are merely haggling over boundary issues. In my view, these are matters that are fit and proper arguments in the substantive suit. For the foregoing, I am inclined to dismiss the notice of Preliminary Objection”

Having now had the benefit of the evidence by the parties and submissions by counsel, I am satisfied that this is a claim for land by way of adverse possession and not a boundary dispute. This Court is therefore seized of the requisite jurisdiction to determine it.

24. Section 38(1) of the *Limitation of Actions Act* which allows a party to approach this Court for orders that he has acquired land by way of adverse possession reads:

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 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* C.a. Civil Appeal No 213 of 1996.



25. In *Kasuve v Mwaani Investments Ltd & others* 2004 1 KLR 184, the Court 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 the discontinuation of possession by the owner on his own volition – *Wanje V Saikwa* (no 2) [1984] KLR 284.”

From the evidence herein, I have no doubt in my mind that the Plaintiffs have been in occupation and possession of a parcel of land quiet proximate to the suit land. However, and as will soon become clear, that land is not the suit land.

26. It is common ground that the Defendant is the registered proprietor of the suit land and which the Plaintiffs claim to have acquired by way of adverse possession. In a claim for land by way of adverse possession, there should be no ambiguity or any doubt as to the identification of the land being claimed. Indeed in *Wilson Kazungu Katana & 101 Others v Salim Abdalla Baksbwein & Another* C.a. Civil Appeal No 11 of 2014 [2015 eKLR], the Court said:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.”

Further, the same Court held in the case of *Maweu v Liu Ranching & Farming Co-operative Society Ltd* 1985 KLR 430 [1985 eKLR],

“Adverse possession, is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300.”

The thrust of the Plaintiff’s case is that they have been in occupation and possession of the suit land for over 12 years. In paragraph 4 of his supporting affidavit, the 1<sup>st</sup> Plaintiff averred that:

“I have been in possession of a portion of Bunyala/Bulemia/851 measuring 0.1 hectares with Mama Magdaline Kanu Obuolo occupying another part measuring 0.1 hectares, uninterrupted peacefully and continuously for over 12 years.”

The 2<sup>nd</sup> Plaintiff repeated the same in paragraph 6 of her statement dated 2<sup>nd</sup> July 2021 where she said:

“The respondent has never utilized and or taken possession of the suit land apart from her existing on records of land registration number Bunyala/Bulemia/851. I have lived on this suit parcel of land with my family and Simon Juma Khaliango and I have buried my husband on this land.”

However, the report dated 27<sup>th</sup> April 2023 by Mr Nicholas A. Obiero the Land Registrar Busia and which was produced as part of the evidence herein with the consent of the parties demonstrate that infact the Plaintiffs are not adversely in occupation of the suit land. The final findings made by the said Land Registrar and which I shall cite in extenso due to their relevance of this issue read as follows:

“Determination

- 1: The 2<sup>nd</sup> Applicant’s occupation of land is entirely inside parcel No 2237. She has just recently encroached into parcel No 851 by building a pit latrine.
- 2: The 1<sup>st</sup> Applicant’s houses and developments are in parcel 2237. He has recently built a pit latrine which encroaches into parcel 851. His fence has



also encroached into the western end of parcel 851. Further evidence may be needed to establish when the fence was erected but I believe they are relatively new.

- 3: The 1<sup>st</sup> Applicant has erected pillars on the remaining section of parcel 851. These pillars are new, probably less than 3 years old.
- 4: It is my opinion that the dispute can be addressed by ascertaining the position of the boundary between parcels 851 and 2273.” Emphasis mine.

27. There is of course the valuation report prepared by the firm of Rightend Appraisal who are registered valuers, estate agents and property managers at the request of the Plaintiffs and dated 9<sup>th</sup> January 2023. The same was introduced into the pleadings vide the 1<sup>st</sup> Plaintiff’s supplementary affidavit dated 8<sup>th</sup> February 2023. That report has the following opening remarks:

“Terms of reference

We received instructions from Simon Juma Khaliango & Magdaline Obwolo to inspect the above referenced property with a view to advise on the current market value for Advisory purposes.” Emphasis mine.

Although the report refers to the suit land and developments thereon done by the Plaintiffs, it must be remembered that the core duty of a valuer is to assess the value of a property. When it comes to the extent of the property, on the ground, the Land Registrar and Surveyor are, by virtue of the provisions of Section 19 of the *Land Registration Act*, the proper authorities. This Court must therefore rely on the report by the Land Registrar. Indeed the Land Registrar has in his report conceded that the Plaintiff’s developments, though entirely on the land parcel No Bunyala/Bulemia/2237 have encroached on the suit land. He has also said that those developments are “relatively new” and “probably less than 3 years old.” A casual look at the photographs annexed to the valuation report do indeed show new developments one of which infact appears to be still in the process of construction. If those are the developments which the Plaintiffs seek to rely on in support of their claim, and going by the report of the Land Registrar, they are not 12 years old. It is also instructive to note that the report of the valuers has no indication as to when the said developments were put up and which is not surprising because that was not part of the valuers terms of reference.

28. This Court also takes note of the fact that the sale agreement between the 1<sup>st</sup> Plaintiff and Emmanuel Mbanda Otuke dated 8<sup>th</sup> December 2001 is headed:

“Re Land Payment Parcel No 163”.

That land, as indicated on the certificate of search above, belongs to persons who are not parties herein. Most significantly, the impact of that agreement is that the 1<sup>st</sup> Plaintiff infact purchased the land parcel No Bunyala/Bulemia/163 and not the suit land.

29. Ultimately therefore, and having considered all the evidence herein, I am not persuaded that the Plaintiffs have established a claim to the suit land by way of adverse possession.

30. The report by the Land Registrar is clear that the structures which they have put up are “entirely inside” the land parcel No Bunyala/Bulemia/2237 but with some recent encroachment in the suit land not more than 3 years old. The threshold for proving a claim to the land by way of adverse possession has not been established.

31. The up-shot of all the above is that the Plaintiffs’ suit is dismissed with costs.



**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023  
BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

