



REPUBLIC OF KENYA



**KENYA LAW**  
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**Buluma v Wanyama (Enviromental and Land Originating Summons  
E002 of 2020) [2025] KEELC 3485 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3485 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2020**

**BN OLAO, J**

**APRIL 29, 2025**

**BETWEEN**

**MICHAEL SIBI BULUMA ..... PLAINTIFF**

**AND**

**MARGARET AKOTH WANYAMA ..... DEFENDANT**

**JUDGMENT**

1. Michael Sibi Buluma (the Plaintiff) had previously moved to this Court vide his Originating Summon dated 16<sup>th</sup> September 2020 and filed on 17<sup>th</sup> September 2020 seeking against Margaret Akoth Wanyama, Anjeline Aoko Ojiambo and Judith Wanyama the main remedy that he has acquired by way of adverse possession a portion of land measuring 1.0 acre out the land parcel No Bunyala/Mudembi/1195.
2. The Originating Summons was subsequently amended on 22<sup>nd</sup> September 2022 in which Margaret Akoth Wanyama (the Defendant) is the only Defendant while names of the other two have been deleted. By the said amended Originating Summons, the Plaintiff seeks a determination of the following issues and claims to have acquired by way of adverse possession a portion of land measuring 1.0 acre out of the land parcel No Bunyala/Mudembi/3258 (the suit land) previously known as land parcel No Bunyala/Mudembi/1195. Those issues are:
  - a. Whether the Plaintiff has been in open, quiet and notorious possession of the land parcel No Bunyala/Mudembi/3258 for a period exceeding 12 years.
  - b. Whether the Defendant's title to the land parcel No Bunyala/Mudembi/3258 became extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the land i.e. 1999.
  - c. Whether the Plaintiff has now acquired title to the land parcel No Bunyala/Mudembi/3258 by way of adverse possession.



- d. Whether the registration of the Defendant as owner of the land parcel No Bunyala/Mudembi/3258 should be cancelled and the Plaintiff registered as owner of the said parcel of land.
  - e. Who should pay the costs of this suit.
3. Arising out of the above, the Plaintiff sought judgment against the Defendant in the following terms:
1. That the Defendant's right over the land parcel No Bunyala/Mudembi/3258 got extinguished by adverse possession upon expiry of 12 years from the time the Plaintiff came into possession from 1999.
  2. That the Defendant be ordered to execute all relevant statutory documents required of her to facilitate the transfer of the land parcel No Bunyala/Mudembi/3258 to the Plaintiff and in default, the Deputy Registrar of this Court do execute the same in place of the Defendant.
  3. That the Defendant, her family members, servants, agents and those claiming through her be permanently barred, restrained and/or injuncted from taking or using or in any way interfering with the Plaintiff's land parcel No Bunyala/Mudembi/3258.
  4. That the Defendant pays costs of this suit.

Together with his amended Originating Summons, the Plaintiff filed his supporting affidavit dated 22<sup>nd</sup> September 2022 and a statement of his witness Ernest Oduori Makhulo (PW2) dated 9<sup>th</sup> October 2020.

4. In his supporting affidavit, the Plaintiff has deponed that in 1999 while he was serving as a Police Officer in Nyeri, he purchased from one Ibrahim Wanyama Magina (now deceased) a portion of land measuring 1.0 acre out of the land parcel No Bunyala/Mudembi/1195. His wife started cultivating the said land and he planted trees thereon while on leave. His intention was that his sons would inherit it and build their houses thereon. They did not go to the Land Control Board and he continued cultivating the land even after Ibrahim Wanyama Magina died in 2013. The Defendant is the wife to the said Ibrahim Wanyama Magina and filed a Succession Cause without informing him yet his occupation of the suit land has been peaceful and quiet. That the land sale agreement executed between him and the Defendant's deceased husband was destroyed when his house was burnt in 2015.
5. That upon conducting a search at the Lands Registry, the Plaintiff has discovered that the Defendant has sub-divided the original land parcel No Bunyala/Mudembi/1195 into several portions and the portion which he occupies and which measures 0.33 Hectares is the suit land. That he has been in peaceful occupation of the suit land since 1999 a period of 21 years and has therefore acquired it by way of adverse possession.
6. The following documents are annexed to the supporting affidavit.
  1. Copy of Green Card for the land parcel No Bunyala/Mudembi/3258 in the name of the Defendant.
  2. Copy of Police Abstract issued on 8<sup>th</sup> September 2020 at Port Victoria Police Station.
7. In his statement dated 9<sup>th</sup> October 2020, the Plaintiff's witness Ernest Oduori Makhulo (PW2) states that he is a close neighbour to the Plaintiff and the Defendant and that he was a witness to the sale agreement between the Plaintiff and the Defendant's husband in 1999. That the sale agreement was executed at the home of the Plaintiff's deceased father Clement Buluma Sibi and the purchase price was Kshs.35,000 for a portion of land measuring 1.0 acre. That unfortunately, the Plaintiff's house



was burnt down in 2015 and his documents including the sale agreement were razed down. That the Plaintiff moved into the suit land immediately after the execution of the sale agreement and started cultivating it. He even planted trees thereon as he had wanted his sons to settle on it. The witness was therefore shocked to learn in September 2020 that the Defendant had sold the land to another buyer and construction had commenced on the suit land after the trees had been cleared. That the Plaintiff is the genuine owner of the suit land since he bought it in 1999 and has been in occupation of the same since then for a period of 21 years.

8. In response to the Originating Summons the Defendant filed a replying affidavit dated 23<sup>rd</sup> February 2023 in which she has deposed, inter alia, that the original land parcel No Bunyala/Mudembi/1195, from which the suit land was excised, belonged to her late husband and was transmitted to her following the succession process. That she holds the title thereto and the Plaintiff does not occupy nor use it in any way. The Plaintiff's claim is therefore made in bad faith and should be dismissed.
9. Annexed to the replying affidavit is a copy of the title deed to the suit land registered in the name of the Defendant on 8<sup>th</sup> May 2015.
10. The hearing commenced on 25<sup>th</sup> July 2024 when the Plaintiff testified. His witness Ernest Oduori Makhulo (PW2) thereafter testified on 3<sup>rd</sup> October 2024. They both adopted as their evidence the contents of their affidavit and statement already referred to above. The Plaintiff also produced as part of his documentary evidence the copy of the Green Card to the suit land and the copy of the Police abstract.
11. The Defendant did not testify.
12. Submissions were thereafter filed both by Mr Juma instructed by the firm of J. V. Juma & Company Advocates for the Plaintiff and by Mr Okutta instructed by the firm of Ouma-Okutta & Associates Advocates for the Defendant.
13. I have considered the evidence on record and the submissions by counsel.
14. There is no doubt that the Defendant has since 8<sup>th</sup> May 2015 been the registered proprietor of the suit land. The Plaintiff's claim is that he is entitled to an order that he has acquired the said land by way of adverse possession having been in occupation thereof since 1999. Section 38(1) of the [\*Limitation of Actions Act\*](#) allows him to approach this Court for such an order. It reads:

“Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as proprietor of the land or lease in place of the person they registered as proprietor of the land.”

In the case of *Kasuve -V- Mwaani Investment Ltd & Others* 2004 I KLR 184, the Court had the following to say about proof of a claim to land by 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.”

Adverse possession is a fact to be observed upon the land itself – *Maweu -V- Liv Ranching & Farming & Co-operative Society Ltd* 1985 KLR 430.



15. In the case of *Kimani Ruchine & Another -V- Swift Rutherford & Company Ltd* 1976-80 I KLR 1500, Kneller J had the following to say about a claim to land by way of adverse possession:

“The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, nec clam, nec plecario* (No force, no secrecy, no evasion) ... The possession must be continuous, it must not be broken for any temporary purposes or by any endeavours to interrupt it or any recurrent consideration; see *Wanyoike Gathure -V- Beverly* 1965 E.A. 514.”

Adverse possession is all about dispossession of the owner by the claimant. In *Wambugu -V- Njuguna* 1983 KLR 172, it was held that:

“In order to acquire by the statute of Limitation a title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

The Court went on to add that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

16. The Plaintiff's case is that he took possession of the suit land in 1999, following a land sale agreement between him and the Defendant's deceased husband. He did not produce the said sale agreement stating that it was among his documents which were destroyed when his house was burnt. He produced a copy of the Police Abstract dated 8<sup>th</sup> September 2020 showing that he reported the incident at the Port Victoria Police Station in which he listed a land sale agreement among the documents which were lost. The Police Abstract, however, does not refer to any fire incident. Instead, it refers to “loss of land sale agreement”. In view of the fact that the existence of the said land sale agreement was never rebutted, this Court is ready to accept that indeed there was such a sale agreement.
17. However, a claim to land by way of adverse possession is all about dispossessing the owner of the land in dispute. And even though the Defendant did not testify, the Plaintiff was still under a duty to prove his case to the required standard which is on the balance of probabilities.
18. It does not mean that since the Defendant did not testify, the trial Court must find the Plaintiff's case as proved. In the case of *Charter House Bank Ltd (under Statutory Management) -V- Frank N. Kamau* 2016 eKLR, the Court of Appeal had occasion to consider the burden of proof in a case where the Defendant failed to adduce evidence. It said:

“We would therefore venture to suggest that before the trial Court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probabilities by reasons of the Defendant's failure to call evidence, the Court must be satisfied that the Plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the Defendant ... The Plaintiff must adduce evidence which, in the absence of rebuttal evidence by the Defendant convinces the Court that on a balance of probabilities



it proves the claim without such evidence, the Plaintiff is not entitled to a judgment merely because the Defendant not testified.” Emphasis mine.

Section 107 of the *Evidence Act* provides that:

107: “Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

As a general rule, the legal burden of proof lies upon the party who has invoked the aid of the law and substantially asserts the affirmative of any issue – Evans Nyakwana -V- Cleophas Bwana Ongaro 2015 eKLR.

19. The Plaintiff’s case is that he is entitled to the orders that he has acquired the suit land by way of adverse possession since he and his wife have been cultivating it and have also planted trees thereon. In paragraph 5 of his supporting affidavit, he has deponed thus:

5: “That my wife started cultivating the land immediately and when I was home on leave I planted trees.”

In rebuttal to that averment, the Defendant deponed in paragraph 6 of her replying affidavit thus:

6: “That the Applicant does not occupy and or use or in any way connected to the portion we are entitled to 3258 or any of parties originally 1195.”

To prove that he has been cultivating and has also planted trees on the suit land, the easiest thing would have been for the Plaintiff to avail photographs of the trees as proof of his occupation and use of the suit land especially in view of the Defendant’s assertion that the Plaintiff does not use or occupy it. The Plaintiff did not do that. When cross-examined by Mr Okutta during the plenary hearing on 25<sup>th</sup> July 2024, the Plaintiff admitted that he had not produced any photographs. That was not really a huge burden cast on the Plaintiff. Unfortunately, he did not surmount it yet the burden was on him.

20. Most significantly his own witness Ernest Oduori Makhulu (PW2) stated the following when cross-examined by Mr Okutta:

“I witnessed the Plaintiff paying Kshs.35,000 as purchase price for the land parcel No Bunyala/Mudembi/1195 for 1 acre. I don’t know in whose name the land is registered. The land is now being used by some man from Kisii whose names I do not know. He has been on it for about 5 years. Previously, the Plaintiff was using the whole land. He has since sold a portion to a Kisii man but he is using a small portion of the land in dispute.”

It is clear from the above that the land which the Plaintiff seeks in adverse possession is infact being utilized by a person who is not part of these proceedings. I also note from the record that when the Plaintiff filed a Notice of Motion dated 22<sup>nd</sup> September 2020 seeking to restrain the Defendant and two others from interfering with his occupation of some land which he alleged to have purchased in 2015, his application was stuck out by Omollo J vide a ruling delivered on 10<sup>th</sup> February 2021. In striking out the Plaintiff’s Motion, the judge found that the Plaintiff was seeking orders in respect of land which did not exist. From that ruling, it is obvious that the suit land and two other parcels of land being land parcels No Bunyala/Mudembi/3253 and 3254 are resultant sub-division of the original land parcel No Bunyala/Mudemi/1195. All this taken together leads to the irresistible conclusion that even



if the Plaintiff purchased a portion of land from Ibrahim Wanyama Magina to be curved out of the original land parcel No Bunyala/Mudembi/1195, he is not certain which of the resultant sub-divisions, if any, he actually occupies. That explains why he first filed this suit against three (3) Defendants vide his Originating Summons dated 16<sup>th</sup> September 2020 before amending it two (2) years later on 2<sup>nd</sup> September 2022.

21. As already stated above, a suit hinged adverse possession to land is all about the claimant demonstrating that he has dispossessed the registered proprietor of the land in dispute for the requisite twelve (12) years. Having pleaded that he and his wife have been cultivating and planted trees on the suit land, it is not clear why he did not place before this Court any evidence to show that infact he has a crop and trees on the suit land. Then there is the evidence of his own witness Ernest Oduori Makhulu (PW2), that the Plaintiff has since sold a portion of the land to some “Kisii man” and is only using a portion of it. If, as stated by the Plaintiff’s own witness, he has already sold part of the land, so what is his interest in the suit land which he claims? This can only mean that the Plaintiff is not certain about his claim. Yet, as was held in the case of *Wilson Kazungu Katana & Others -V- Salim Abdalla B & Another* 2015 eKLR:

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

From all the above, it is doubtful if the Plaintiff actually took possession of the suit land and planted crops and trees on it and has been doing so since 1999. And if he did, it is obvious from the testimony of his own witness that he has since sold a portion of it in which case, he should have been specific what portion of the suit land he retained and seeks by way of adverse possession. Notwithstanding the fact that the Defendant did not testify. I am not persuaded from the evidence on record that the Plaintiff has placed before this Court credible evidence to justify the orders sought.

22. Ultimately therefore and having considered the evidence herein, I make the following disposal orders:
1. The Plaintiff’s suit is dismissed.
  2. Costs to the Defendant.

**BOAZ N. OLAO**

**JUDGE**

**29<sup>TH</sup> APRIL 2025**

**Judgment dated, signed and delivered by way of electronic mail and with notice to the parties on this 29<sup>th</sup> day of April 2025.**

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**29<sup>TH</sup> APRIL 2025**

