



**Ndania v Wandera (Environment and Land Case Civil Suit
E007 of 2021) [2022] KEELC 2997 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE CIVIL SUIT E007 OF 2021
AA OMOLLO, J
JUNE 23, 2022
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF L.R NO. BUKHAYO/MUNDIKA/12701
AND
IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION**

BETWEEN

OJIAMBO NDANIA APPLICANT

AND

JOSEPH OSINYA WANDERA RESPONDENT

JUDGMENT

1. The Applicant commenced these proceedings vide the Originating Summons dated 8th February, 2021 against the Respondent. The Applicant's case is that he has acquired by way of adverse possession a parcel of land measuring 0.1Ha out of the L.R NO. Bukhayo/Mundika/12701 and posed the following questions for determination:
 - a) Whether the Applicant has been in quiet and notorious possession of a parcel of land measuring 0.1Ha out of L.R No. Bukhayo/Mundika/12701 for a period exceeding 12 years from 2002 until 2014 when the Respondent's rights extinguished;
 - b) Whether the Respondent's title to a parcel of land measuring 0.1Ha out of L.R No. Bukhayo/Mundika/12701 became extinguished upon expiry of 12 years from 2002 until 2014 when the Respondent's rights were extinguished;



- c) Whether the Applicant should be registered as the owner of a parcel of land measuring 0.1Ha of L.R No. Bukhayo/Mundika/12701;
 - d) Who pays the costs of this suit?
2. The Applicant seeks to be granted the following ORDERS:
 - a) That the Respondent's rights over land measuring 0.1Ha out of L.R No. Bukhayo/Mundika/12701 got extinguished in 2014 by adverse possession upon expiry of 12 years from the time the Applicant came into possession in 2002;
 - b) That a parcel of land measuring 0.1Ha out of land parcel No. L.R No. Bukhayo/Mundika/12701 be registered in the name of the Applicant;
 - c) That the Respondent be ordered to execute all the relevant statutory documents required of them to facilitate the transfer of a parcel of land measuring 0.1Ha out of L.R No. Bukhayo/Mundika/12701 to the Applicant and in default the Deputy Registrar of the Court do execute the same in place of the Respondent;
 - d) That the Respondents, his family members, servants or agents and those claiming under or through him be permanently barred or inhibited from disposing of, using, or in any way interfering with the Applicant's possession of the said parcel of land; and
 - e) That the costs of this case be borne to the Respondents.
3. The Originating Summons was supported by the affidavit dated 8th February, 2021 which attached a copy of the register for the Suit Land. The Applicant contends that he bought 2 plots of land added together to measure 0.1Ha from one Ogutu Daudi who was the Respondent's brother at a total price of KShs.10,000/= . That he took possession of the said parcel immediately and constructed his home thereon on the 5th of May, 2002. That he is still in possession of the said portion of land to date. That although Ogutu Daudi died before he could give him title but the Respondent has always known that the Applicant resides on the said portion.
4. The Respondent filed a replying affidavit on the 7th of December, 2016 contesting the Applicant's claim. He deposed that he is the son to Daudi Wandera Odanga- deceased, proprietor of the initial title to the land question and who died in 1977. That his younger brother Ogutu Daudi was totally ill in the year 2002 and was incapable of transferring a portion of the suit land to the Applicant as averred. The Respondent argues further that the land was still in their father's name making it impossible for Daudi Ogutu to have transferred the land. That during his lifetime, Ogutu denied selling the land to the Applicant. Subsequent to demise of his younger brother, he carried out succession of their father's estate and the land transmitted to his name. That the suit land was subdivided into three portions: 12701, 12702 and 12703 and 12701 and 12702 are still registered in his name. According to the Respondent, the Applicant has no beneficial interest in his father's estate and is therefore a trespasser on the land.
5. The viva voce hearing commenced on the 11th November, 2021 with either party relying on sole evidence. The Applicant stated that the Defendant is his neighbour after Ogutu Daudi sold to him the suit portion in May, 2002 and he immediately built a house and settled thereon which place he has lived there to date. That the Respondent is also living on the suit land on the share given to him by his father while he is living on the share given to Ogutu Daudi. He stated that although the agreement for sale got burned in his mother's house and Ogutu Daudi passed on, the Respondent was aware that he



lives on the land. He concluded by stating that he bought two plots and he stays on the land and asked the court to grant his prayers in the originating summons.

6. On cross-examination, PW1 stated that he bought two plots from Ogutu Daudi in the year, 2002 and he died approximately two years after selling him the land. That he did not pursue the title for his portion because he waited to carry out the subdivision with the Respondent. That when he bought the land, there was no survey report to confirm the size of land bought. That the Respondent's averments that he lived in Uganda are not true as he has always lived at home and he is even using a portion of his land by force. That he is claiming the land he is in possession of and he has no idea about title no. 15890 which portion was derived from portion no. 12701. In re-examination, PW1 stated that the land had been shared out to the Respondent and his brother although their father had not given them their separate titles. That the sub-divisions were undertaken by the Respondent.
7. The Respondent testified as DW1 and adopted his replying affidavit as his evidence in chief and proceeded to produce the documents annexed thereto as Dex 1 to DEX 4 being the death certificate, the mutation form, the certificate of grant and the copy of the title for land parcel no. 15890 respectively. I will not repeat contents of the replying affidavit since it is already summarised above.
8. In cross-examination, DW1 confirmed that Daudi Ogutu was his younger brother and admitted that he carried out the subdivision because the land was his after the administration of his father's estate. He confirmed that title for parcel number Bukhayo/Mundika/15890 (Dex 4) was issued in the 29th of March, 2021 after the present case was filed. When asked about the availability of the mutation form for land parcel number 5327, DW1 stated that he had left it at home. He stated further that LR 12701 was registered in his name and he did not sell the land to the Applicant. That the Applicant is staying on the land illegally and without his permission. That he reported him to the D.O and Chief to write to have the Applicant vacate the land. In re-examination, DW1 stated that although he does not know the size the Applicant occupies, he lives on a portion of L.R 15890 and not L.R No. 12701 which he claims.
9. The Applicant filed his submissions on the 15th of December, 2021. He submitted that the Respondent in his replying affidavit admitted that he was aware of his alleged encroachment on the suit land from the year 2002. That the Respondent is the sole successor of his father's estate and despite the subdivision of the land into various units, he is still the registered owner of suit parcel number Bukhayo/Mundika/12701. That despite the Respondent knowing of his presence on the suit land in 2002, he did not attempt to evict him and that the Applicant has had 19 years of peaceful, open occupation of the land where he resides with his family. He prayed for judgement as per the originating summons together with the costs of the suit.
10. Despite being given numerous time extensions to put in their written submissions, the Respondent did not file the same.
11. From a consideration of the parties' pleadings, and evidence, the issues framed for determination is just one to wit;
 - a) Whether the Applicant has proved his claim for adverse possession over the Suit Land;
 - b) Who bears the costs of this suit?
12. A claimant for land under the principle of adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions*



Act, CAP 22 Laws of Kenya. In case law, the definition of adverse possession was restated in Mtana Lewa vs Kabindi Ngala Mwagandi (2005) eKLR where Justice Asike Makhandia J.A held:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period 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 nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”

13. The Applicant explained that his entry on to the suit land was through purchase from Ogutu Daudi-deceased who was the Respondent’s younger brother in the year 2002. He asserted that immediately purchasing the land, he settled thereon by building a house which house he lives on to date. He affirmed that he has never received any eviction notices nor attempted to be evicted from the land by the Respondent despite him knowing that he has been living openly on the land since 2002. DW1 on the other hand corroborated the Applicant’s averments of occupation in his replying affidavit at paragraphs 5 and 6 where he deposed that:

“That on or about the year 2002, I left home Siteko and went to Samia for work; that while I was at Samia, I heard rumours that someone had encroached on our land and is claiming that he bought a portion of our late father’s parcel of land from my younger brother.”

14. Despite his knowledge of the encroachment, the Respondent did not attempt to evict the Applicant from the said land. During cross-examination he confirmed that, “The Applicant is still living on the land but illegally, as I never sold him land. It is true that the Applicant has stayed on the land since 2002 without my permission.” His evidence that he involved the Chief and the District Officer to have the Applicant evicted was not substantiated by any documentary evidence.

15. The real question therefore is: has the Applicant been on the suit portion of the land, for more than twelve years, peacefully, continuously and uninterrupted with the knowledge of the proprietor. The answer would be in the affirmative going by the evidence adduced. The Applicant had lived on the suit land for a period of 18 years prior to instituting this claim with the Respondent’s knowledge. In the case of Daniel Kimani Ruchine vs. Swift Rutherford Co. Ltd & Another (1977) eKLR Kneller J held that,

“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). So, the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. It must not be broken for any temporary purposes of by any endeavours to interrupt it or by any recurrent consideration....”

16. Based on the evidence on record, the Applicant has proved his case on the balance of probabilities that the possession of the Suit Land was open, actual, continuous and uninterrupted for nineteen (19) years, therefore he is entitled to be awarded the land by dint of adverse possession. During the pendency of this suit, the Respondent caused a subdivision of the suit title Bukhayo/Mundika/12701 to create title numbers 15890 - 0.653ha; 15891- 0.046ha; and 15892 - 0.05ha. This evidenced by the copy of title for 15890 issued in his name on 29th March, 2021. The intention of doing this besides amounting to abusing the doctrine of lis pendens, is to defeat the claim by the Applicant. Consequently, I make a finding that the Applicant is entitled to get his portion of land measuring 0.1ha sold to him whether the land is L.R. 12701 or new created number L.R. 15890.



17. In conclusion, I enter judgement for the Applicant in the following terms:

- a) A declaration be and is hereby made that the Applicant has acquired a portion of land measuring 0.1ha by way of adverse possession from land title number Bukhayo/Mundika/12701 or Bukhayo/Mundika/15890.
- b) The Respondent is directed to execute subdivision and transfer documents for a portion measuring 0.1ha out of property known as L.R No. Bukhayo/Mundika/12701 or 15890 in favour of the Applicant within thirty days' failure to which the Deputy Registrar shall execute the same to facilitate the registration of the portion measuring 0.1Ha in the name of the Applicant;
- c) An order of permanent injunction is hereby issued restraining the Respondent, his family members, agents, servants, employees and ALL persons claiming through them from interfering with the Applicant's use of his portion of L.R No. Bukhayo/Mundika/12701; and
- d) The costs of the suit are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF JUNE, 2022.

A. OMOLLO

JUDGE

