



**Egesa & 6 others v Mulimba & another (Environment & Land Case 110 of 2015) [2022] KEELC 3740 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 110 OF 2015**

**AA OMOLLO, J**

**JUNE 9, 2022**

**BETWEEN**

**JOHN ODIKA EGESA ..... 1<sup>ST</sup> APPLICANT**  
**NICHOLUS JUMA EGESA ..... 2<sup>ND</sup> APPLICANT**  
**CALISTUS EGESA ..... 3<sup>RD</sup> APPLICANT**  
**GEORGE VINCENT WANDERA ..... 4<sup>TH</sup> APPLICANT**  
**ALBERT OUMA EGESA ..... 5<sup>TH</sup> APPLICANT**  
**SAMUEL SANYA EGESA ..... 6<sup>TH</sup> APPLICANT**  
**ALFRED JOHN EGESA ..... 7<sup>TH</sup> APPLICANT**

**AND**

**ESTABEL MULIMBA ..... 1<sup>ST</sup> RESPONDENT**  
**OUCHO MALIMBA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicants commenced these proceedings *vide* the Originating Summons dated 30<sup>th</sup> September 2015 and filed in court on 5<sup>th</sup> October 2015 against the Respondents. It was later amended on 7<sup>th</sup> December 2015 with leave of court. The Applicants claim to have acquired by way of adverse possession rights over L.R NO Bukhayo/mundika/421 measuring approximately 2.4 Hectares or any other title derived therefrom as on the ground currently registered in the name of Estabel Mulimba And Oucho Malimba. The Applicants posed the following questions for determination:
  - a. Whether the Applicants have been in open, quiet and notorious possession of L.R. NO. Bukhayo/mundika/421 measuring 2.4HA for a period exceeding 12 years.



- b. Whether the Respondents' title to L.R. No. Bukhayo/mundika/421 became extinguished upon expiry of 12 years from the time the Applicants went into possession of the land i.e. from the year 1969.
  - c. Whether the Applicants have now acquired title to the said land by virtue of adverse possession.
  - d. Whether the registration of the Respondents' as owner of whole of L.R. NO. Bukhayo/mundika/421 should be cancelled and the Applicants be registered as the owners.
  - e. Who should pay costs of the suit.
2. The applicants seek to be granted the following orders;
- i. That the Respondents' rights over the whole parcel of land known as L.R. NO. Bukhayo/mundika/421 measuring 2.4HA got extinguished by adverse possession upon expiry of 12 years from the time the applicants came into possession, that is from the year 1969.
  - ii. That the Applicants be ordered to be registered as owners of L.R. Bukhayo/mundika/421.
  - iii. That the Respondents be ordered to execute all the relevant statutory documents required of them to facilitate transfer of LR. Bukhayo/mundika/421 measuring 2.4ha into the names of the Applicants and that in default, the Deputy Registrar of the Court do execute the same in place of the Respondents.
  - iv. That the Respondents perpetually be barred and or injuncted from taking, using or from in any way interfering with the Applicants' portion of the suit land.
  - v. That the costs of the case be borne by the Respondents.
3. By way of supporting affidavits sworn by each of the applicants, they impleaded that they have been occupying and using L.R Bukhayo/mundika/421 since the year 1969 upto today. That their father subdivided the suit land to them after which he advised them to make a search on the land registry so that he can apply for a title deed and make it possible for them to get title deeds for their respective portions. It is during the search that they found out that the suit land was registered under the Respondents names.
4. The Respondents entered appearance *vide* a detailed Replying Affidavit deposed by the 1<sup>st</sup> Respondent dated 13<sup>th</sup> November 2015 and filed in court on 19<sup>th</sup> November 2015. She deposed that she is the current absolute co-registered owner of all that parcel of land designated as Bukhayo/Mundika/421 measuring approximately 2.4 ha jointly and severally in undivided shares with her son, the 2<sup>nd</sup> Respondent. She deposed that she is a total stranger to the allegations against her by the applicants regarding the purported uninterrupted peaceful vacant occupation and possession of the suit land since 1969.
5. The matter proceeded for hearing on 15<sup>th</sup> July 2021 with the 1<sup>st</sup> Applicant testifying as PW1 by adopting his witness statements and affidavits dated 30/9/2015 as his evidence in chief. He testified that the applicants are his brothers and they live on the same parcel of land. Their father's home was built on parcel No. 423 and their father shared land amongst his children and they started using their shares. In 1990, a surveyor was brought to carry out the subdivision and while doing a search, they discovered their land was having two numbers i.e. 421 and 423 with L.R. 421 registered in the names of the defendants. He continued that their father said he never sold any land to anyone. The Applicants decided to trace the defendants and only discovered that the 1<sup>st</sup> defendant lives in Bukhalaire in Marachi. They filed the case because the 1<sup>st</sup> defendant did not agree to transfer the land to them at



- the meeting held at the Chief's office. According to this witness, they are using the land running from the road to the river. They have lived on the suit parcels peacefully from date of birth until now and they have developed the land and use it for planting food crops. He produced the green cards for the two parcels as PEX 1&2.
6. On cross-examination by counsel for the Respondents, PW1 disclosed that his father, Egesa Siongola died on 30/5/2018. That the seven applicants are all living on the land and the boundaries existing is only between the portions amongst the brothers but there is no boundary between L.R. 421 and L.R. 423. He stated that none of them have built houses on suit parcel 421 however, they are using it for cultivation and planting trees. The witness added that they did not build houses on it because they knew the land was not theirs but it was not true that the 1<sup>st</sup> defendant has been cultivating the suit parcel. They denied writing any letter to the lands office nor was he aware of the letter dated 21/6/2012 produced as MFID 3. He denied knowing the name of the 1<sup>st</sup> defendant's husband adding they also met the 2<sup>nd</sup> defendant at the home of the 1<sup>st</sup> defendant. On re-examination, he stated that he saw the 1<sup>st</sup> defendant on the land after some people came to the land and the 1<sup>st</sup> defendant had lodged a complaint instead of coming in peace as had been agreed.
  7. Estabel Bakhoya Mulimbathe sole witness for the defence used her witness statement dated November 18, 2015 as her evidence. She testified that in 1969, Gilbert Ouma, the registered owner of the suit parcel then and personally known to her late husband, approached them seeking to sell off his land compromised in the title, and under a mutual understanding between her late husband and herself, the applicant's father, who was then a neighbour of their landlord and sold them his land compromised in L.R. 421 via an agreement dated December 23, 1969. That she was present for the payment of the purchase price, and that the land was vacant and free of encumbrances. It is her evidence that the vendor relinquished unoccupied possession to them after they assumed ownership pending registration and transfer in their names. Their former landlord, to the best of her knowledge, designated the boundary features on the ground to identify it from the adjacent parcels of land, particularly the applicant's father's land under title numbers Bukhayo/Mundika/422 and 423, which the applicants and their father were occupying.
  8. That the copy of sale agreement was lost when her husband was fatally injured in a road accident at Korinda Junction; which loss they reported to the police station and received a police abstract for it. That the father of the applicant was aware of the registration of the land into their name but he did not object because he had no stake in the land. They used to farm the property while they lived in Marachi for many years. As a result of the distance, they chose to let the land lie fallow while they worked on a plan to grow sugarcane, trees, and other developments there. That in 2009 or thereabouts, the plaintiffs began staking a claim to the land at issue by forcibly trespassing on it through planting trees and denying the defendants' access. She asserted that they had legal and equitable rights with her co-owner over the land in question.
  9. The 1<sup>st</sup> Defendant claimed that the applicants were guilty of failing to disclose important facts to the court comprised in presentation of a bogus and fabricated letter to the area chief on June 21, 2012, alleging that the defendants had no interest in the suit land. She produced as DEX1 the green card, DEX2 was the copy of the search certificate for L.R.421, DEX3 was the copy of the letter dated June 21, 2012, and DEX4 was the police abstract. On cross-examination by plaintiff's counsel, she said that Gilbert Ouma is one of Egesa's sons. That she knew him when they were talking about buying the land, and she knew the land existed while being referred to paragraph 19 of her affidavit dated November 18, 2015.



10. The parties agreed to exchange written submissions. The Applicants put in their written submissions on 14<sup>th</sup> January 2022 and submitted that this was a case of absentee landlords who got registered in 1972 without even knowing where the land was and whether it was vacant or occupied. They urged the court to declare them as the owners of Bukhayo/mundika/421 as they have been in open and peaceful possession for a period of over 12 years since 1969. They relied on the following authorities; *Aziza Soud Hamisi v Loise Nduta Itotia* (2019 Eklr And *Mary Ajimbo Nafula & Angeline Nabwire Nyongesa v George Wafula Tororo* Busia Elc No. 20 of 2019.
11. The Respondents put in their written submissions on 8<sup>th</sup> March 2022 and submitted that the applicants have failed to prove their case for adverse possession against the respondents as they have failed to show that they use the land. She denied that all the 6 applicants are in occupation of the suit land and that they have only planted trees on a portion as said trees were planted by the respondent.
12. I have analysed the pleadings, the evidence and the submissions made by the parties, the only question for determination of the dispute is;
  - i. Whether the applicants have proved their claim of adverse possession;
  - ii. Who should bear the costs of this suit?
13. The applicable law on adverse possession is settled both by statute and precedent. One of such requirements to be met in order to succeed in such a suit was stated in *Wambugu v Njuguna* (1983) KLR 173, where the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.
14. PW1 gave evidence on his own behalf and on behalf of his brothers who are the co-applicants when he stated that they have been in occupation of the suit land since 1969 and all that time, they did not know that the suit title was distinctly registered from the parcel of land where their home is under L.R. No. 423. The Applicants position is that from 1969 to the time the sharing of the land was done by their father, they all lived on what they knew as parcel number 423. That it was only after the surveyor was called in 1990 when they discovered following a search conducted that what was shared out to them was comprised in the suit title and L.R. 423.
15. One of the requirements for proving adverse possession is to show that the portion claimed is demarcated and is identifiable. From the evidence presented, it was not demonstrated what size of the suit land each applicant was allocated. The plaintiff said they learnt the suit land existed on a separate title when they called a surveyor to mark out portions gifted to them by their father for purposes of acquiring title. Their witness did not elaborate whether the demarcation exercise actually proceeded. Although the Applicants are claiming the whole land the court still felt there was obligation to show that the share of each Applicants comprised in the suit land noting that what was being share in their mind was parcel No. 423.
16. Further, cross-exam, the witness admitted that none of them had built on the land because they knew the land belonged to someone else with only some of them were cultivating the land. Thus the 1<sup>st</sup> Applicant contradicted himself when he said they had not built on the land because they knew the land belonged to someone else yet in his evidence in chief he stated that they had lived on the land since 1969 and there was no boundary between parcel 421 and parcel 423. The witness failed again to tell



the Court who among them was cultivating the suit land, and when the Applicants planted the trees on the land.

17. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J quoted Gicheru, J A, in Kweyu's case, that in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto* use, and *de facto* occupation must be shown.

The Applicants evidence that they were using the land knowing that it was theirs (forming part of their land where their home is which is parcel number 423) means that time could only start running from the time they discovered the land was registered in the name of someone else. The discovery apparently was made when they conducted a search at the lands office. They do not say when exactly they did this search but they have annexed a copy of the search dated 27<sup>th</sup> August 2015 for parcel No. Bukhayo/Mundika/421. The said search shows at entry 3 a restriction placed on behalf of the Applicants family on December 18, 2009. This is the closest date the Applicants have shown their knowledge of the land being in the name of the defendants.

19. The question then asked is whether the use of the land if any could be adverse when the owner had no knowledge of their use and occupation. The defendants have raised a defence that they used to farm the land but due to distance between where their home was and the land, they let the land lie fallow as they planned how to use it for cultivating sugarcane. So that if it was the intention of the defendants to let the land lie fallow for a while then it cannot be said that they were dispossessed of the intention they intended to put the land to use for.
20. In the case of Olao J. in the case of *Johnson Thaiika Nyaga v Kinyua Nyaga & 5 others* (2018) eKLR quoted *Jandu v Kipral* (1975) E.A 225 where the court stated that the registered owner must know that he has been ousted. Further that an adverse possession cannot succeed if he did not know that he was in actual possession of another's land. In the Case of *Kiniani Ruchire vs Swift Ruther Food & Co. Ltd* (1980)KLR at page 16 letter B, 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 precario* (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

21. Consequently in light of my analysis that the Applicants failed to state that from the time when their occupation became hostile the 12 year period had expired; failed to show that the owner was aware of their occupation and failed to show their demarcated portions claimed, I hold that they have not proved their case. Accordingly, their suit becomes a candidate for dismissal and is forthwith dismissed. The costs of the suit awarded to the defendant.



**DATED, SIGNED AND DELIVERED AT BUSIA THIS 9TH DAY OF JUNE 2022.**

**A. OMOLLO**

**JUDGE**

