



**Opetu & another v Komwoyo & another (Environment & Land Case  
E011 of 2021) [2022] KEELC 3680 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3680 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E011 OF 2021  
AA OMOLLO, J  
JUNE 8, 2022  
IN THE MATTER OF THE LAND REGISTRATION ACT SECTION 28 (H)  
AND  
IN THE MATTER OF THE LIMITATION OF ACTIONS  
ACT SECTIONS 7,37 AND 38 LAWS OF KENYA**

**BETWEEN**

**WILLIAM LAURENCE OPETU ..... 1<sup>ST</sup> APPLICANT**

**ERNEST OYINGO OGOLA (SUING AS PERSONAL REPRESENTATIVE OF  
FRANCIS OGOLA OWADE) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FREDY MESHACK OPONDO KOMWOYO ..... 1<sup>ST</sup> RESPONDENT**

**LAWRENCE MUSIBI MAKANDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants brought the present application under Order 40 Rules 1-3 and section 7 of the [Limitation of Actions Act](#) CAP 22 Laws of Kenya on the 7<sup>th</sup> of December, 2021 for Orders that:
  - a. Spent;
  - b. Interim orders be issued restraining the 2<sup>nd</sup> Respondent, his agents, relatives, employees and any person whatsoever acting on his behalf from burying the body of the Defendant's deceased's daughter named Emma Musibi who died on the 2<sup>nd</sup> of December, 2021 on the suit land No. Marachi/elukhari/2245 that is intended to be buried thereon on the 11<sup>th</sup> of December, 2021 until determination of the application and subsequently the suit;



- c. Interim orders be issued restraining the 2<sup>nd</sup> Respondent, his agents, relatives, employees and any person whatsoever acting on his behalf from entering the suit land No. Marachi/elukhari/2245 and erecting any structure, building or house thereon using the suit land in any other manner whatsoever interfering with the smooth possession of the Plaintiff's possession thereof until this application and subsequent suit is determined;
  - d. OCS Butula Sub-County Policy Station to oversee the execution of these orders;
  - e. Any order that this Hon Court deems fit and just to grant in favor of the Plaintiffs;
  - f. Costs of this application to abide the result of the suit.
2. The Application was supported by the affidavit of Ernest Oyingo Ogolla dated 7<sup>th</sup> December, 2021 and the following grounds;
- a. That, the 2<sup>nd</sup> Defendant who intends to bury the body of his deceased daughter in the suit land does not stay in the land and the rights to the ownership of the suit land has been transmitted to the Plaintiffs by the operation of the law by way of adverse possession in which circumstances such ownership by the Plaintiffs cannot be defeated by reasons of one being a registered proprietor;
  - b. The 2<sup>nd</sup> Defendant has slashes and cleared a small portion of the suit land no. Marachi/elukhari/2245 with an intent to bury the said body of his daughter on the land;
  - c. The 2<sup>nd</sup> Defendant is now preparing to build a house and other structures on the suit land No. Marachi/elukhari/2245 for the use of his daughter's funeral;
  - d. There is no physical boundary on the ground on land No. Marachi/elukhari/204 from which the suit land No. Marachi/elukhari/2245 was created to indicate the Defendant's land and the Defendants ought to be restrained from using any part of the suit land until the matters herein are determined;
  - e. None of the Respondents/Defendants stays on the suit land. They neither have any house nor structure not cultivate the suit land whereby it is the Plaintiffs staying on the suit land and cultivate it and shall suffer prejudice if the orders sought are granted;
  - f. The suit land has been transmitted to the Plaintiffs by the operation of the law in the circumstances that cannot be defeated by reason of one being a registered proprietor thereof.
3. The 2<sup>nd</sup> Respondent, Lawrence Musibi Makanda filed his Replying Affidavit on the 15<sup>th</sup> of December, 2021 where he swore in part that:
- a. He buried his late daughter Jane Anyango Musibi on his parcel title No. Marachi/elukhari/2245 on the 11/12/2021 which land he has always cultivated and has been in full occupation thereof, with various structures thereon since he purchased it in 1995;
  - b. He has no daughter called Emma Musibi as alleged by the Applicants;
  - c. The burial site on which he buried his daughter JANE Anyango Musibi, is the same place where he buried his eldest daughter Farida Dora Musibi in April, 2011;
  - d. In any event, Jane is already buried and as such, the Applicants' application is overtaken by events.
4. The Applicants filed a Further Affidavit on the 28<sup>th</sup> of December, 2021 where they swore that:



- a. In 1995 he bought a portion of land from land No. Marachi/elukhari/204 from its owner Odongo Owale by which time they had stopped the Respondent and the Surveyor to plant a boundary on the land and that they built their houses on the portions that the Respondent alleges were sold to him.
  - b. They complained to the D.O and attempted to include the Respondents in the case against their seller. That they attempted to join the Respondents in Civil Case No. 359 of 1995 against their seller which case ended with the death of seller;
  - c. The Respondent stays at Kanjala village about 2 ½ kilometers away from the suit land and sicne stopped planting the boundary and coming on the suit land and neither has he constructed any structure thereon;
  - d. The Respondent's family members who died have been buried on land No. Marachi/elukhari/203 where the Respondent stays and which land was owned by Lwerera Owade who was a brother to his mother;
  - e. The Respondent buried his daughter on the land after the present suit had been filed.
5. During the hearing of the application on the 15<sup>th</sup> of December, 2021, parties agreed to canvass the application by way of written submissions. The Applicant filed their submissions on the 28<sup>th</sup> of December, 2021. They submitted that the crux of this suit is based on adverse possession. That they cultivate the whole of Marachi/elukhari/204 and even built houses thereon. That even though the Respondents bought the land from the owner their titles deeds ought not to be reasons to allow the Respondents to enter the suit land to dispossess the Applicants before the suit is heard and decided. They submitted further that the present application was intended to stop the Respondents from burying the body of his daughter on the suit land or to interfere with the said land in any way. That unless the Respondents are restrained from interfering with the suit land, they shall use their titles to destroy the Applicants' houses, trees and crops dispossessing the Applicants from the land and leaving nothing for this Court to come and view as evidence that this will defeat the intention and usage of section 7 of the Limitations of Actions Act, Cap 22 LOK. They urged this Court to allow prayer 3 of the application and that the costs abide with the decision of the suit.
  6. The Respondents filed their submissions on the 15<sup>th</sup> of February, 2021. They submitted that the main prayer for the application stopping the burial of the Respondent's daughter had been overtaken by events and as such the only prayer left pending is the one seeking interim orders of injunction against the 2<sup>nd</sup> Respondent from inter alia using the suit land or any part thereof until the suit is determined. That the prayer is not available to the Applicant as the 2<sup>nd</sup> Defendant had deponed that he has been in continues to be in actual possession of the suit land since the time of purchase in 1995. That this order can only be granted if the applicant establishes his claim after a full hearing if the main suit. They urged the Court to dismiss the costs.
  7. The Applicants responded to the Respondents submissions on the 1<sup>st</sup> of March, 2022. In their rebuttal they stated that the Respondents have not deponed to staying in the suit land nor disputed the fact that, in 2002, he was convicted on an offence that arose from a dispute when he stopped to come and use the suit land. They have not deponed on how they came back in possession after they had stopped using the land and had been convicted of an offence.
  8. From the pleadings particularly the contents of the particularly the contents of the further affidavit, the Applicants ascertain two facts. First that the deceased is already buried at paragraph 9 of the further affidavit. He also stated that the land he bought comprised in parcel No. Marachi/Elukhari/204 is



neighbouring the home of the 2<sup>nd</sup> defendant built on parcel No. 203. The 2<sup>nd</sup> defendant in his replying affidavit deposed that he buried his daughter on his land parcel number 2245.

9. The fact that the deceased is already buried on 11/12/2021 and the same cannot be undone at this interlocutory stage. Therefore prayer (2) that sought to stop the burial of Emma Musibi or Jane Musibi is overtaken by events. Prayer (3) of the motion sought injunction to stop the defendants from erecting any structures or building any house or interfering with the plaintiffs possession until the suit is heard and determined. In his replying affidavit, the 2<sup>nd</sup> Respondent stated that he has always been in occupation with structures on the land since 1995 a fact which the Applicants dispute.
10. It appears that both parties herein are claiming they are in occupation of the same parcel of land. It is important to preserve the suit property in its current state. The only way this can be achieved is by issuing an order of injunction which I give specific to barring the Respondents from erecting any new structures or buildings on the land, not to cut down any trees or plant any boundaries until this suit is heard and determined.
11. The winning party shall get the costs of the application at the conclusion of the case.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 8<sup>TH</sup> DAY OF JUNE, 2022.**

**A. OMOLLO**

**JUDGE**

