



George v Omuse (Sued as the Legal Representative of Basil Pamba Okomuli alias Omuse Opama Ikom (Deceased)) (Environmental and Land Originating Summons 9 of 2012) [2022] KEELC 3804 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3804 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2012

AA OMOLLO, J

JULY 28, 2022

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION

BETWEEN

DAVID OPRONG GEORGE APPLICANT

AND

NORAH ADHIAMBO OMUSE RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF BASIL PAMBA OKOMULI ALIAS OMUSE OPAMA IKOM (DECEASED)

JUDGMENT

1. The applicant commenced these proceedings *vide* the originating summons dated October 24, 2012 which he amended on the June 24, 2015 and later on the 16th of June, 2021 against the respondent. The applicant's case is that he has acquired by way of adverse possession all that parcel of land known as LR No Teso/Apokor/150 measuring 3.61Ha for determination of the following issues:
 - a) That the applicant David Oprong Georgebe declared the absolute registered owner of all parcel of land known as LR No Teso/Apokor/1350 measuring 3.61Ha in which he has been in actual possession notoriously, adversely, openly and uninterrupted for a period exceeding 22 years;



- b) Whether the applicant and/or George Ernest Wasike, John Ochokoloherein referred to as the deceased, purchased LR No Teso/Apokor/1350, portion create on subdivision on LR No Teso/Apokor/1318;
 - c) Whether the deceased and/or the applicant was given vacant possession in 1986 or thereabout;
 - d) Whether the deceased/and or applicant and their family have been in open, quiet, peaceful occupation of the whole land 1350 since 1986 to date;
 - e) Whether the respondent and or Basil Pamba Okomoli's rights and interests extinguished by operation of the law and now holds in trust the whole land LR No Teso/Apokor/1350 in favour of the applicant;
2. The applicant seeks to be granted the following Orders:
- a) A declaration that the deceased and or applicant has acquired and be registered owner of the whole land parcel No LR No Teso/Apokor/1350;
 - b) That the respondent, Norah Adhiambo Omuse be ordered to execute all the documents of transfer in respect of the whole of the aforesaid parcel No LR No Teso/Apokor/1350 measuring 3.61Ha as occupied on the ground in favour of the applicant Davod Oprong Georgefailing which the Deputy Registrar of this court or an authorized officer of this court be empowered to execute the same in place of the respondent and the Land Registrar to dispense with the production of the original title deed if the respondent fails to comply and/or produce the same;
 - c) That pending the hearing and determination of this suit, an inhibition do issue restraining the respondent from interfering with or in any manner transferring land parcel No LR No Teso/Apokor/1350;
 - d) That the costs of this application be provided for, be borne by respondent.
3. The re-amended originating summons was supported by the applicant's supporting affidavit dated June 16, 2021 to which he attached several documents including a copy of the green card of the suit land. The applicant contends that his father George Ernest Wasike, John Ochokolo bought from Basil Pamba Okomol alias Omuse Opema Ikomoli a portion of land parcel number LR No Teso/Apokor/1350 which on completion of subdivision and registration became LR No Teso/Apokor/1351. That his father then took possession of the said land parcel number 1351 in 1980 and to date no issues have arisen from the said land to date.
4. He deposed further that in 1986, the respondent's father offered to sell and his father accepted to buy the remaining portion of land parcel number LR No Teso/Apokor/1350 which was number 697 and upon settling the purchase price, his father was granted vacant possession of the entire parcel of land known as LR No Teso/Apokor/1350 and the respondent's father migrated to Ojamii within Busia municipality. The applicant deposed further that his father settled him on the land in 1990, has been in open and quiet possession of the land and has extensively developed the same.
5. The respondent filed a replying affidavit on the 24th of September, 2021 in response to the re-amended summons. She deposed that she was the daughter to the late Omuse Opama Ikomoli who died intestate on 1st of July, 2021 and left behind land parcel number LR No Teso/Apokor/1350 measuring 3.61Ha which land transmitted to her and a title deed issued in her names. The respondent does not deny that the applicant's father bought land from her father, only that he bought land parcel Number LR No Teso/Apokor/1351 and not LR No 1350. That the applicant gained entry into the said land sometime



in 2002 and filed the present suit in 2012 which meant that his right to adverse possession had not crystallized. She deposed further that at no time did her father offer to sell neither did he sell land parcel number LR No Teso/Apokor/1350. That the present case has no merit because the applicant has not occupied the land peacefully and notoriously for over 12 years as he has alleged.

6. The hearing commenced on the September 27, 2021 with the evidence of Titus Ojwang testifying as PW1, a surveyor with the Ministry of Lands Busia. That he visited the land parcel number S.Teso/Apokor/697 pursuant to a court order dated July 22, 2020 which had been subdivided into 1350 and 1351 and that both parcels are developed and occupied by the plaintiff. He stated further that one side of the home has permanent structures while the other side has trees which are almost 20 years old. While testifying on the history of the land, PW1 stated that land parcel number 697 was initially subdivided into 1317, 1318 and 1319 and it was land parcel number 1318 that was subdivided into 1350 and 1351 totaling an acreage being 10¼ acres. He continued to state that no physical boundary exists between 1350 and 1351. He concluded by producing his report as PEx 1.
7. On cross-examination, PW1 stated that from the history he got of the land, the plaintiff has been occupying the place since 1992. He stated that while using GPs coordinates he picked the boundaries in the dotted form because there was no visible boundary on the ground. He concluded that based on the mutation there is a possibility that the plaintiff's house could be on the boundaries between the two parcels. During re-examination, PW1 reiterated that the plaintiff's houses run across the two parcels and that on the ground there exist no feature separating parcel No 1350 and 1351.
8. The applicant, David Oprong George testified as PW2. He adopted the contents of his initial supporting affidavit dated October 25, 2012 and the further affidavit deposed on July 15, 2015 as his evidence in chief. He stated that George Ernest Wasike was his father while Basil Pamba was the respondent's father. It is his evidence that LR No 1351 was purchased by his father in 1981 and later in 1986, he bought more land from the respondent's father referred to now as LR No 1350. That his father used the land until 1990 when PW2 built his home thereon and he has been living there to date. That the respondent's father moved out and migrated to Ojarii adding that the defendant has never lived on the land.
9. PW2 continued to state that his father bought the second portion in 1986 although he could not recall the purchase price. He denied the respondents aversions that he grabbed the land. With regards to the issue of boundaries, PW2 stated that no boundary existed between the two parcels. He concluded by stating that he has extensively developed the properties and produced the annexures on his affidavits as PEx 1- 8.
10. During cross-examination, PW2 reiterated that his father purchased the land while it was registered as parcel number 697 which parcel was later subdivided into three portions including parcel number 1318. That it is LR 1318 that was later subdivided into 1350 and 1351. He stated that he did not have an agreement for parcel number 1350 but parcel number 1351 was transferred to his father. The applicant stated that when he took possession of the two parcels in 1990, no boundary existed and he had not built any houses on the alleged boundary of 1350 and 1351. He also denied getting on the suit land in 2002 as he had put his fence up in 1990. On re-examination, PW2 reiterated that his father gave him both plots and that no boundary existed between the two plots.
11. Etyang Apaa Joseph testified as PW3 and adopted his witness statement dated October 6, 2015 as his evidence in chief. During cross-examination, PW3 stated that he was present when Omuse Opama sold land to John Ochokolo even though he did not know the parcel number. That Omuse moved to Ojarii because he had a home there and after he died he was buried in his father's land. He agreed that the land is one. He concluded by stating that the plaintiff came to the area in the year 1990 when



- his father brought him there. On re-examination, PW3 stated that his land shares a boundary with the Plaintiff's. He reiterated that the land was one although he did not know the parcel number.
12. Erneo Papai Okou testified as PW4 stated that he knew both parties in the case as his home is near the parties' land/home. That George Ochokolo bought land from Omuse in the year 1981 and he ploughed the land without any dispute and in 1986 he bought the remaining portion of the land. That George started using the entire land after that and subsequently the plaintiff has been using the entire land since 1990.
 13. Upon cross-examination, PW4 stated that he was present when KShs 3,000 was paid to Omuse in 1981 as well as during the second purchase before the village elder. He reiterated that the respondent's father sold the entire parcel of land and that the plaintiff built on the portion first purchased. On re-examination, PW4 stated that the Liguru wrote the agreement for the 2nd purchase and after that purchase, the land became one. This marked the close of the plaintiff's case.
 14. The defence case kicked off on the 25th of January, 2022 with the respondent, Norah Adhiambo Omuse testifying as DW1 and the sole defence witness. She adopted her affidavits dated July 21, 2014 and September 24, 2021 as her evidence in chief. She testified that the Plaintiff came onto the land parcel number 1351 in 1990 after being brought by his father. She asserted that her land parcel was 1350 and that the Plaintiff's father never interfered with the said land during his lifetime. That when her father died he was buried on parcel number 1350. DW1 stated that the David's father did not purchase the entire parcel of land and that the applicant entered the land in 2002 after the demise of her father and after PW2 destroyed the boundaries, started planting trees and cultivating the land. That the plaintiff has not been on the land for over 12 years as he claims.
 15. During cross-examination, DW1 stated she was born in 1976 thus she was 10 years old in 1986 when the second purchase was done. That although she got married in 1992 in Kwangamor, she still visited the suit land. She stated that the applicant's father never used land parcel number 1351 but he put the applicant to use the parcel instead. She stated that she has never used the suit land since she got married as every time she goes there the applicant chases her. She admitted that the applicant started using the land by force from the time she got married. That their houses were on parcel 1350 but they were demolished. With regards to the conflicting chief's letters, DW1 stated that she only agreed with the first chief's letter and not the second one that purported that the applicant had been on the land for 20 years. She produced the documents annexed to her replying affidavits as Dex 1-11.
 16. During re-examination, DW1 stated that she obtained a grant which facilitated her to get the title to the suit land. That she has not used the land since she got married in 1992 due to hostility from the applicant. That her father's home was in parcel number 1350 and that between the years 1992-2002, the plaintiff was only using parcel number 1351. This marked the close of the defence case.

Submissions

17. The applicant filed his submissions on the February 16, 2022. He submitted on seven issues for determination. The first issue was whether his father purchased the suit property land parcel number 1350 to which he replied in the affirmative and stated that PW3 and PW4 corroborated that evidence. He submitted further that the absence of an agreement for sale was dispensed with immediately he was given possession and the fact that the claim is not for specific performance makes the issue of the sale irrelevant. The second issue was whether the applicant or his father took possession of the suit land. The applicant while reiterating the averments of paragraphs 9 and 11 of his supporting affidavits and the evidence of PW3 and PW4 submitted that all this evidence points to the effect that his father took



vacant possession of land parcel number 1350 in 1986 while he took possession in 1990 and has been in occupation to date.

18. On the third issue on whether the possession was continuous, the applicant submitted that save for his evidence that he has been on the said land from 1990 to date, the respondent agreed with his assertions. That the respondent did not produce any evidence to prove that she attempted to evict him from the land of that she filed a complaint with law enforcement. While submitting on the fourth issue of whether his possession was adverse to the interests of the respondent with regards to the suit land, the applicant stated that the fact that neither the respondent or her father gave consent for him to possess the land. That his occupation of the land is therefore adverse to that of the respondent. On the 5th, 6th and 7th issues, the applicant submitted that he took possession and consequently and as such the respondent's rights and interests with respect to the land were extinguished by operation of the law and she holds the land in trust for the applicant. He concluded by submitting that he had proved his case and was therefore entitled to all the prayers sought.
19. The respondent submitted on the following issues for determination: first, whether the case meets the legal threshold for adverse possession. While relying on the Case of *Wambugu vs Njuguna* (1983) KLR 173, the respondent stated that for adverse possession to succeed, the time of dispossession and subsequent possession is of essence. That although in her testimony she agreed that the applicant settled in the land in 1990, he only settled on parcel number 1351 and not 1350. She stated that the applicant started interfering with the suit parcel in the year 2002 when her father died. That the dispossession took place in 2002 while this suit was filed in 2012 and as such the adverse possession had not crystallized by that time. The respondent continued to state further that PW1 had confirmed in his testimony that it was possible that the plaintiff had constructed some of his houses on the boundary of parcels 1350 and 1351 which boundary had been placed by her father.
20. The second issue the respondent submitted on was whether the plaintiff and/or his late father bought LR No South Teso/Apokor/1350. She stated that although the applicant testified that his father bought the suit land in 1986, he failed to produce a sale agreement for the purchase. She relied on the case of *Ratilal Gova Sumaria & Another vs Allied Industries (K) Limited* (2007) eKLR where it was stated that all sale agreements must be in writing as provided under section 3 of the repealed *Law of Contracts Act*, cap 23. That the absence of the agreement for sale only fits to describe the applicant's intention to grab the land. She submitted that if there was ever a sale agreement over the suit land, then the same was null and void for failure to comply with section 6 of the *Land Control Act*, cap 302 as no consent was obtained from the relevant Land Control Board.
21. The final issue was what remedy is available in these circumstances under which the respondent submitted that the plaintiff has failed to prove his case to the required standards and as such, his case should be dismissed with costs.

Determination

22. Having considered the parties' pleadings, submissions and the applicable law, the questions framed for determination are as follows:
 - a) Whether the applicant's father bought the land parcel number South Teso/Apokor/1350;
 - b) Whether the applicant has proved his claim of occupation of the suit parcel for a period in excess of twelve years;
 - c) Who bears the costs of this suit?



23. The issue on whether or not the respondent's father sold and the applicant's father purchased land parcel number South Teso/Apokor/1350 has been raised by both parties as one of the major issues in this case. PW2, PW3 and PW4 all stated that the applicant's father bought the remaining portion of land parcel number 697 from which the current suit parcel number 1350 was created. PW3 and PW4 both stated that they were present during the sale. When questioned about the agreement for sale, PW3 and PW4 stated that they did not know where a copy of the same was. The respondent on the other hand stated that there was no sale for the remainder of the portion. Despite the absence of a written contract to prove the sale, this court is estopped from indulging in the question of whether the contract was valid or not by virtue of section 4(1)(a) of the *Limitations of Actions Act* which provides thus;

‘The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(c) actions founded on contract;’

24. The contract was allegedly entered into in 1986 and as such the time for any action to be brought with regards to the said contract lapsed in 1992. Despite the provision in section 3 of the *Law of Contracts Act* that the contract must be in writing any action with regards to the contract, oral or written should have been initiated before the lapse of the limitation period. The question of whether there was a sale or not has been answered by the applicant's witnesses. PW3 and PW4 who were witnesses.

25. The main issue for determination is whether the applicant has acquired the suit parcel by adverse possession. The doctrine of adverse possession in Kenya is embodied in section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya, which provides thus: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

26. PW2 led evidence to the effect that his father purchased a portion of land parcel number 697 in 1981 and later in 1986 he purchased the remaining portion which is the subject matter of his suit. The applicant's witnesses stated that the applicant took possession of the suit land in 1990 and has been in occupation since then. In her cross-examination, DW1 admitted that the applicant took possession of land parcel number 1351 in the year 1990 but got into possession of the suit land in 2002. DW1 also stated that she got married in 1996 and has never used the land since then. That her attempts to visit the land proved futile as the applicant would chase her away.

27. In analysing the evidence of the witnesses on record, I find some gaps on the respondent's evidence. The applicant stated that the respondent's father migrated to Ojarii after selling the remainder portion of LR 697. The respondent did not deny this fact and she did not elaborate on who destroyed their houses (home) that was on the suit parcel and when these houses were demolished. This piece of evidence would have corroborated her evidence that her father got buried on the suit parcel No 1350.

28. In an affidavit annexed as NAO 5(a) sworn on July 8, 2002 by the respondent, she deposed at paragraph 3 and 4 thereof that her father Basil Pamba was found dead in his house on 1/7/2002 at a place called Ojarii. Annexure NAO5(d) which is the translated funeral program does not give the place of burial or the parcel number where the funeral program took place. The respondent did not call any evidence to corroborate her assertion that indeed they still had a home on parcel number 1350 as at 2002 even after her father had moved out.



29. A claimant for the land 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. While discussing the doctrine of adverse possession, Justice Asike Makhandia J A in *Mtana Lewa vs Kabindi Ngala Mwangandi* (2005) eKLR described adverse possession as below:

“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.”

30. The applicant’s case is hinged on the fact that he has been in possession of the suit parcel from 1990 to date. That means that by the time of filing this suit, the applicant had had possession of the land for 22 years. These averments were confirmed by PW3 and PW4 with the latter confirming that he is a neighbour to the applicant. In *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated that a plaintiff in a claim for adverse possession has to prove;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

31. The applicant led evidencethat that he has been in exclusive control of the suit land and demonstrated his animus possidendi in developing the suit land through construction of the permanent houses, planting trees and cultivating the suit land. He produced photos (PEx 5) and a survey report to confirm the extent of his use of the land. The respondent in her testimony stated that she had been unable to use the land from the time she got married in 1996 because the applicant has been hostile to her. She stated thus:

“I admit paragraph 29 of my replying affidavit of September 24, 2021. When I go to the land, David chases me away. Since I got married, I have never used the land. David has been using the land by force since I got married.Our house was on parcel number 1350 but they were demolished. I do not remember when the houses were demolished. I visited the houses last in 1990...”

32. From the foregoing statements, it is clear that the applicant’s possession of the land has been to the extent that the respondent has been unable to use the land since 1996 from the respondent’s testimony and from 1990 by the applicant’s testimony. Evidence was led to prove that the respondent had knowledge of the applicant’s possession of the land. Although the respondent was aware of the applicant’s presence on the land and his “hostility” the respondent’s access to the land, she took no steps to recover possession from the applicant. Consequently, pursuant to the provisions of section 18 of the *Limitations of Actions Act*, the respondent’s father’s title to the land got extinguished twelve years after the applicant took possession with the twelve years having expired whether time is counted from 1990 or 1996.

33. The totality of the foregoing evidence is, this court is satisfied that the applicant has proved his claim for adverse possession hence the respondent is holding the title in respect of the suit land number South



Teso/Apokor/1350 in trust of the applicant. Consequently, judgement is entered for the applicant as follows;

- a) The applicant has acquired by adverse possession the whole land parcel known as South Teso/Apokor/1350.
- b) The respondent execute transfer documents for the land parcel known as South Teso/Apokor/1350 in favour of the applicant within sixty (60) days from date of this judgment. Failure to which the Deputy Registrar shall execute the same to facilitate the registration of said land in the name of the applicant;
- c) Each party to meet their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF JULY, 2022.

A. OMOLLO

JUDGE

