



Etyakoro & 6 others v Omusolo & Obari (Sued on their own behalf and as the Legal Representatives of the Estate of Enjesloys Omusolo Obari (1st Deceased) & another (Environment & Land Case 35 of 2016) [2022] KEELC 2479 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2479 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 35 OF 2016
AA OMOLLO, J
JULY 21, 2022
IN THE MATTER OF THE LAND REGISTRATION ACT
AND
IN THE MATTER OF L.R NO. SOUTH TESO/ASINGE/377
AND
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

BETWEEN

JARED ANYIKO ETYAKORO 1ST APPLICANT
WYCLIFFE EJAKAIT OMARE 2ND APPLICANT
WILLIMINA AKOL 3RD APPLICANT
FIRINGINA ABALI 4TH APPLICANT
JESCA EJAKAIT ORUBIA 5TH APPLICANT
DAVID OLOGE OPURU 6TH APPLICANT
MICHAEL ERAPU RICHARD ODEKE 7TH APPLICANT

AND

CHRISTIAN WAFULA OMUSOLO AND EVALINE AKISA OBARI
(SUED ON THEIR OWN BEHALF AND AS THE LEGAL
REPRESENTATIVES OF THE ESTATE OF ENJESLOY S OMUSOLO OBARI (1ST
DECEASED) 1ST RESPONDENT
ROMANO ERONE ITADI (SUED ON HIS OWN BEHALF AND AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF ITADI OBARI (2ND
DECEASED) 2ND RESPONDENT



JUDGMENT

1. The Applicants took out the Originating Summons dated April 13, 2016 against the Respondents seeking to be declared as having acquired by acquired by way of adverse possession portions of land measuring 1 ½ , 6, 2, 1 ½ , and ½ acres respectively all totalling to 11 ½ acres comprised in the land known as South Teso/asinge/xxxx measuring approximately 8.8Ha (22 acres). They posed the following issues for determination:
 - a. That the Applicants be declared the absolute registered proprietors of 1½, 6, 2, 1½, and ½ acres all totaling to 11 acres or thereabouts of the parcel of land known as South Teso/asinge/xxxx in which they have been in actual possession notoriously, adversely, open and uninterrupted for a period exceeding 12 years as demarcated on the ground;
 - b. That the Respondents be ordered to execute all documents of transfer of the said 11 acres or thereabouts in total of all that parcel of land known as South Teso/asinge/xxxx in respect of the Applicants as per their respective shares as demarcated on the ground failure to which an authorized officer of this Honourable Court be empowered to execute the same in place of the Respondents and the Land Registrar to dispense with the production of the original title deed if the Respondents do not comply;
 - c. That na inhibition do issue restraining the Respondents, their agents, servants, family members and/or persons working under them or under their instructions from interfering with, selling, disposing of, transferring, sub-dividing, evicting the Applicants in any manner dealing with land parcel number South Teso/asinge/xxxx pending hearing and determination of this suit;
 - d. That the costs of the Summons be provided for.
2. The Originating Summons was supported by the Supporting Affidavits deposed by the respective Applicants all dated April 13, 2013. The Applicants pleaded that they bought different portions comprised in the land known as South Teso/asinge/xxxx and that they all paid the consideration in full. All the Applicants have deposed that they have extensively developed their respective portions and have been using the same to the exclusion of the Respondents.
3. The 2nd and 3rd Respondents filed a joint Replying Affidavit on the October 3, 2018 and deposed inter alia, that the suit property belonged to Itadi Obari and Enjesloys Omusolo Obari. That to date they have been unable to utilize the half (½) share of the land left to them by their fathers. They contended that they are not aware of the individual known as Itellen Namusieka mentioned by the 3rd Applicant as selling land to her. That the sons of Itadi Obari occupy 9 acres while the portion occupied by the Applicants is supposed to be utilised by them as it belonged to their late father Enjesloys Omusolo Obari. That the 1st and 2nd Respondents are each entitled to a ½ share of the suit land which legally belonged to their father.
4. The hearing commenced on the February 17, 2021 with the evidence of Wycliffe Ejakait Omare testifying as PW1. He testified that he knew all his co-Applicants as well as the Respondents. PW1 gave a brief history of the land, stating that the land belonged to Etadi and Omusolo Obare who were brothers to one Augustino Wafula. PW1 said he bought land from the two sons of Augustino measuring six (6) acres. That even though the title deed was registered in the joint names of Itadi and Omusolo, Augustino was entitled to ½ a share of the suit land which was approximately 11 acres of the land S.Teso/Asinge/xxxx, Itadi's share was 9 acres and Omusolo's share approximately 2 acres. That



- he was sold a portion of the land by Andrew in 1991 and later another portion by Francis in 1993 amounting to 6 acres and he took possession immediately.
5. PW1 continued in evidence that on the ground the shares for the three brothers are clearly demarcated and Augustino shares a boundary with Itadi with a road separating their portions of the land. That his portion is also clearly demarcated and he uses the land to date. He stated that both him and his son have built permanent houses on the land, with another house, two toilets, a well, six rental rooms towards the road and a forest of trees. That none of the Defendants have never used the share belonging to Augustino. PW1 claimed that Christian uses 2 acres belonging to their father, Omusolo. They brought this suit because the 1st and 2nd Defendants took out letters of administration in respect of the title number South Teso/asinge/xxxx and after the 3rd Defendant took out the letters, the land was subdivided into 8 portions. That his share falls within South Teso/asinge/xxxx while that of the 1st Defendant falls under South Teso/asinge/xxxx. PW1 produced his documents as per his lists of documents in support of the case.
 6. During cross-examination, PW1 acknowledge the fact that did not annex a certified copy of the green card to his supporting affidavit. He stated that the registered owners did not object to his entry on the land and neither to his burying his demised son on the suit land in 2006. He admitted that he had not produced photographs to show that there are houses on his portion or that he planted trees. He also stated that he did not plead when he entered the land. PW1 stated further that it was a mistake to not have Augustino's name entered in the green card. PW1 was aware that the certificate of confirmation of grant issued to the Defendants in 2016 gave them each 11 acres of the suit land and they are currently the registered owners of the land with the 3rd Defendant registered in 1993.
 7. PW1 stated that from the agreement for sale that he has it is evident that he has been on the land for over 12 years and even though the agreement did not specify when he entered the land, he was entitled to the land from the date of the agreement. That the land was subdivided as shown in the map even though sub-division no. 1806 has not been registered and neither has subdivision no. 1799 that belonged to the 1st and 2nd Defendants.
 8. During cross-examination by the 3rd Respondent, PW1 reiterated that the suit land is currently registered in the names of the three Defendants and that he bought the land in 1991 and started using it immediately.
 9. On re-examination, PW1 stated that the 1st Applicant annexed a copy of the green card as shown in paragraph 4 of the 1st Applicant's affidavit and the same is no. 8 in their list of documents. He stated that the subdivisions were never registered. PW1 stated that although the 1st and 2nd Respondents cultivate their father's share of the land, they do not live thereon. He concluded by stating that no one has denied that he has houses on the land and that he lived there.
 10. Jared Anyiko Etyakor testified as PW2. He stated that he knows all the Plaintiff and Defendants and adopted his statement as his evidence in chief where he stated that he is claiming 1 ½ acres of the suit land which he has lived on from the year 1991 to date. That he bought the said portion at Kshs.15,600 which amount was paid in two instalments of Kshs.6,300 and Kshs.7,300/- which balance he cleared on the 14/2/1994. That the boundaries were planted in 1991 and they remain intact to date. He urged this Court to grant the prayers in the originating summons.
 11. On cross-examination by the 3rd Respondent, PW2 stated that he bought 1½ acres of the suit land which land is in the name of Omusolo and Itadi. PW2 stated further that after buying the land from Francis Muyodi he took possession and no one objected to the same. He stated that the land was registered in Omusolo and Itadi's names. That he concluded paying for the land in 1994 and that he



- has planted trees and cultivates the land. He confirmed that there are boundary marks on the land even though he has no photographic proof of the same. Upon re-examination, PW2 stated that the Defendants have not denied that he has been in occupation of the land since 1991.
12. Wilimina Akoltestified as PW3. She adopted her witness statement as her evidence in chief where she stated that she was claiming 1 ½ acres of the suit land at a consideration of Kshs. 45,000 from Itellen Namusieka, the wife of the late Andrew Wafula and she has been using the said land for over 12 years. That she has developed the land a semi-permanent house, two grass thatched houses and a permanent toilet. That her portion is clearly demarcated by a boundary of sisal and mature trees which trees are even ready for harvesting. That her mother and her grandson reside on the land and her grandmother was buried on the land upon her demise. That she has been in occupation of the land to the exclusion of anybody else from the day she bought the land and urged the Court to grant the prayers in Originating Summons.
 13. Upon cross-examination by the 3rd Respondent, PW3 stated that although she did not remember the date of the agreement, she has been in possession of the land from the years 2000 to date. In questioning by the 2nd and 3rd Respondents, PW3 stated that she bought land from Augustino's share of the land and she got into possession without any objections. That she paid the purchase price in instalments for over a span of three years. She reiterated that she has a semi-permanent house, two grass thatched houses and a permanent toilet and that she had harvested grevilia trees even though she had not produced photographic evidence of the same. That the fact that her grandmother was buried on the land and her mother and son are still living there means that there is no hostility. She concluded that she visited the Chief and the DO over the dispute before filing the present suit.
 14. On re-examination, PW3 stated that her land is demarcated and she wants to be awarded the land as per the boundaries because the Defendants are aware that she lives on the suit portion.
 15. Firingina Abalitestified as PW4. She stated that the co-plaintiffs are her neighbours in the portion where she bought her land. She adopted her statement dated 13th of April, 2016 as her evidence in chief where she stated that she bought ¾ an acre of the suit land at a consideration of Kshs. 94,500 from Hellen Namasa who was the wife to Andrew Omuse Wafula. That the sale agreement was drawn in 2001 and she paid the whole amount at once. That she uses the entire ½ an acre for cultivation and growing food crops and she has mature trees on the land. That there exists a boundary of sisal and mature trees on the land which boundary has been existence since 2001 to date. That she has also dug a permanent bore hole on the land and that from the year 2001 to date, she has been in continuous and adverse possession of the said ¾ an acre of the land to the exclusion of everybody. She prayed for the orders in the Originating Summons.
 16. During cross-examination by the 1st and 2nd Respondents, PW4 stated that the suit land No. xxxx belonged to Augustino Wafula and that from the year 2001 she has been farming the land and has mature trees on the land even though she had no photographic evidence. That no one objected to her tilling the land from the year 2001. She stated that the land was still in the name of Augustino and she has sued the Defendants because Augustino is dead and the Defendants represent his family. She concluded by reiterating that her portion is well demarcated on the ground with sisal planted as boundary marks. That she also attended a meeting before the DO regarding the dispute on the land.
 17. Upon re-examination, PW4 stated that she began using the land from 2001 to date and no one has ever denied that she has been using the land. That in the case before the DO, Wafula demanded 11 acres of LR No xxxx.



18. Jesca Ejakait Otubiatestified as PW5. She testified that the co-plaintiffs are her neighbours and adopted her witness statement where she stated the 1st to 4th Applicants bought the entire share belonging to Augustino Wafula while together with the rest of the Applicants she bought part of the land that initially belonged to Itadi Obari and his family. That she bought the 2 acres land in the year 2003 at a consideration of Kshs. 82,000. That she has been in occupation of the land continuously and consistently for a period exceeding 12 years and has extensively developed the land with two semi-permanent houses, a granary, a bore hole, a pit latrine and by planting over 50 eucalyptus and grevillea trees which are mature and on the remainder of the land she has planted food crops. She stated that her portion is well demarcated with a sisal boundary and that she resides on the land with her husband and children. That since taking possession, no one has ever claimed the land and that she has acquired the land by adverse possession.
19. Upon cross-examination by the 3rd Respondent, PW5 stated that she bought two acres of the land in the year 2003 and that the said land is in the name of Itadi and Omusolo. Further cross-examined by the 1st and 2nd Respondents, PW5 reiterated that the registered owners had no objection to her taking possession. She confirmed that the portion she bought did not belong to Augustino. That even though she has not brought any photos of the structures on the land and the agreement did not indicate when she took possession of the land, she took possession immediately on payment of the purchase price. She confirmed being summoned by the DO in 2014-2015 over a dispute by Wafula. In re-exam, PW5 stated that she bought the land in 2003 from the 3rd Defendant who has not contested her claim. That paragraph 8 of her affidavit stated that she has stayed on the land for over 12 years.
20. Michael Erapu Richard Odeketestifying as PW6 stated that he bought a portion of South Teso/asinge/xxxx and he knows the Defendants because they are his neighbours. He adopted his supporting and supplementary affidavits as his evidence in chief. He stated that he bought his portion of 1 ½ acres of the land from Nelly Akasaba Etyang who was married to the son of Itadi Obari in 2003 at a consideration of Kshs. 138,000. That since he bought the land he has built and cultivated it. He has a permanent house, a pit latrine and mature trees thereon and that the said parcel is secured by a barbed wire fence. That he has acquired title by way of adverse possession.
21. On cross-examination by the 3rd Respondent, PW6 stated that he bought approximately 1½ acres in the year 2003.
22. During the cross-examination by the 1st and 2nd Respondents, PW6 stated that his agreement is dated July 26, 2003 and that although the agreement did not specify when he entered the land but by virtue of payment he took possession. That none of the registered owners objected to his entering the land and that although he had the photographs of his occupation of the land, they were not file as evidence before the Court. He concluded by stating that he was represented in a case before the chief in 2014-2015.
23. On re-examination, PW6 stated that he bought the land from the sister-in-law to Romano and that the latter was aware and even conceded to his claim.
24. The Applicant sought leave to file a supplementary list of documents and consequently to recall PW1 to produce the same which leave was granted. The supplementary list was filed on the February 25, 2021 and PW1 was recalled on the November 30, 2021. He stated that further to the evidence he gave on the February 17, 2021, he wished to produce the documents on the supplementary list which included photos of the Plaintiffs' homes and sale agreements. That in the sale agreement he was buying LR No South Teso/Angoromo/xxxx and the last payment was made to Hellen and Wafula on the July 7, 2003.



25. David Ologe testified as PW7. He adopted his witness statement as his evidence in chief and stated that he lives on land No. xxxx measuring $\frac{1}{4}$ an acre, which he bought from Michael and has lived thereon for 21 years. While referring to the 4th photo on the supplementary list of documents, he stated that he has a house on the land, carries out farming, planted trees on the said land and no one has ever attempted to remove him.
26. During cross-examination by the 1st and 2nd Respondents, PW7 stated that he purchased $\frac{1}{4}$ an acre of the land sold to him by Michael Elekoto who is a younger brother of Romano who gave permission for him to stay on the land. That all the parties living in the land have their respective shares.
27. On re-examination PW7 confirmed that Itadi had given his sons land. That the Defendants are not living on his $\frac{1}{4}$ an acre portion which demarcated. This marked the close of the Plaintiffs' case.
28. The Defence hearing commenced on the November 30, 2021 with the 1st Respondent, Christian Wafula Omusolo testifying as DW1. He adopted his Replying Affidavit dated September 28, 2018 as his evidence in chief wherein he deposed that Enjesloys was his father and they had received a grant in respect of his late father's estate. That the said grant gave him 11 acres to share with the 2nd Defendant. That before he filed succession, he called the Plaintiffs and informed them of his intention to take out the letters of administration and none of them had an objection to the same. The 3rd Defendant took out letters of administration in respect of his father's estate. He stated that land had not been subdivided and that his family members and the Plaintiffs on parcel number 377. He concluded by producing the documents as per the list of documents as Dex 1-10.
29. On cross-examination by the 3rd Defendant, DW1 stated that the suit land was registered in the name of Omusolo Onari and Itadi Obari and each of them carried out succession for the different estates. He stated further that although the Plaintiffs are his neighbors, he was not sure how long they have been living on the land.
30. During cross-examination by the Plaintiffs, DW1 stated that although he stays in Eldoret, he has a home on the suit land within Teso and his brother's son lives in the house. He confirmed that the Plaintiffs have houses on the suit land and live thereon with some permanent house constructed during the pendency of this case. That on the ground, every person had his portion. While addressing the history of the land, he stated that his father had two brothers, Otadi and Lazaro. That Itadi had 3 wives with the 2nd wife being the 3rd Defendant's mother. He denied that Andrew Wafula was Augustino's son and stated that he was not sure whether Augustino and his family were buried on the land or whether the family Augustino sold the land to the Plaintiffs.
31. On re-examination, DW1 reiterated that they live on the land and they have buried their parents and some of their siblings thereon. That they are also cultivating the land. He faulted the Plaintiffs for not bringing documents to identify their shares. This marked the close of the Defence case.
32. The parties were instructed to file their respective submissions. The Plaintiffs filed their submissions on the February 16, 2022. They reiterated the prayers in the Originating Summons and stated that the 3rd Defendant's grandfather, one Itadi was the original owner of LR South Teso/asinge/xxx and because he was childless, he adopted a son, Augustino Wafula. That because Itadi did not want to give the entire land to his adopted son he adopted his nephew, Itadi Obari and shared the land equally among them and demarcated the two parcels. That Itadi Obari then decided to give 2 acres of his portion to his brother Enjesloys Omusolo Obari. That the original demarcation is still present and well recognized by mature trees and other features. That during adjudication, Itadi Obari ignored Augustino and had only him and Enjesloys registered to two equal shares of the land. That all the Applicants' bought



Augustino's share and Itadi Obari's share through his children but have now acquired title by adverse possession.

33. The Applicants in urging this court to allow their claim cited the case of *Samwel Kihamba v Mary Mbasi* [2015] eKLR where the Court held that:

“Strictly to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is it without force, without secrecy and without license and permission of the land owner with the intention to have the land. There must be an apparent dispossession of the land owner....”

34. The 1st and 2nd Respondents filed their submissions on the February 1, 2022 and raised only one issue for determination: whether the Applicants had proved their case for adverse possession. They stated that for one to successfully plead adverse possession they had to meet the principles established by the Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another* [2015] eKLR where it was held that:

- a. One has to show that the parcel of land must be registered in the name of a person other than the Applicant;
- b. The Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and
- c. The Applicant must be in that occupation for a period of 12 years having disposed the owner or there having been discontinuance of possession by the owner.

35. The submitted that the Applicants have the onus of establishing that the land was registered in the name of a person other than them and the issue of Augustino Wafula being a part owner of the suit land ought not to arise as the 1st and 2nd Respondents are the administrators of Enjesloys estate and the 3rd Respondent the administrator of Romano Itadi's estate. While deconstructing the agreements for sale entered into by the Applicants the 1st and 2nd Respondents submitted that the Applicants have failed to prove that their occupation is adverse to that of the Respondents as the agreements were witnessed by the 3rd Respondent.

36. That the Applicants have failed to demonstrate the subdivision of the suit land and have failed to tender any evidence to support their respective assertions that they have been in the suit land for a period of over 12 years. That due to the lack of subdivision, time did not begin to run to support the claim for adverse possession and also due to the fact that the suit property is still whole and is being held by the Respondents as tenants in common. They relied on the case of *Saiqua Sultana Hassan Haroon & 2 others v Abdul Malik* [2016] eKLR, where the Court was guided by the case of *Gatimu Kinguru v Muya Gathangi* [1976] eKLR in holding that:

“... until subdivision is done, the portion of land that belongs to each tenant in their entire parcel which is jointly owned is unidentifiable. It follows that, when the deceased occupied the suit property, he occupied the whole of it by virtue of his interest as a tenant in common....”

37. They concluded by submitting that though it is not in issue that all parties are in occupation of the suit land, the Applicants have failed to discharge the burden of proof on a balance of probabilities and consequently this claim should be dismissed with costs and an order for eviction issued against them for trespassing on the Defendant's suit land.



38. The 3rd Respondent filed his submissions on the January 25, 2022. He reiterated the prayers in the originating summons and stated that he does not oppose the said claim save for the fact that costs should not be visited upon him. He briefly re-stated the history of the land that the land initially belonged to Augustino Wafula and Itadi Obari but was registered in the names of Omusolo Obari and Itadi Obari. That despite the registration, Augustino's share is clearly delineated on the ground by a wide foot path, separating it from Itadi's and Obari's shares. That the two registered proprietors were holding the land in trust for Augustino and that before his demise, Augustino sold his entire land to the Applicants who have been in occupation to date. That none of the Defendants have been in occupation of that portion of the land.
39. He submitted that once he got the letters of administration he subdivided the suit land into parcel numbers South Teso/Asinge/xxxx which is being occupied by the 1st and 2nd Defendants, South Teso/Asinge/xxxx which he occupies, South Teso/Asinge/xxxx is occupied by Stephen Omusolo s/o Itadi Obari, South Teso/Asinge/xxxx is being occupied by Michael Elekoto s/o Itadi Obari and South Teso/Asinge/xxxx is being occupied by Bernard Obari's dependants. He admitted that these new numbers were yet to be registered. The 3rd Defendant concluded by submitting that the Plaintiffs stay on Augustino Wafula's share.
40. In consideration of the parties' pleadings evidence, and submissions, the issues which in my opinion arise for determination are as follows:
- a. Whether the Applicants have proved their claim for adverse possession for 11 ½ (13 ¼) acres to be curved out of the Suit Land;
 - b. Who bears the costs of this suit?
41. Justice Asike Makhandia JA in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] 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.”
42. The Applicants' have led evidence on how and when each of them purchased the different portions of the land. The 1st Applicant contends that he bought 1 ½ acres of the suit land sometime in 1991 and had the boundaries were planted immediately. The 2nd Applicant stated that he bought 6 acres in 1991 and 1993 and took possession immediately, the 3rd Applicant bought 1 ¼ acres of the land in the year 2000, the 4th Applicant bought ¾ of an acre of the land in 2001. The 1st -4th Applicants were sold shares comprised in the share alleged to belong to Augustino-deceased while the 5th Applicant bought 2 acres in 2003, the 6th Applicant bought ¼ acre in 2001 and the 7th Applicant bought 1 ½ acres in 2003 with their portions comprised in the share of Itadi Obare-deceased. The 3rd Respondent who is an administrator of the estate of Itadi Obare does not contest the claim brought by the Applicants.
43. All the Applicants' witnesses in their testimonies averred that they have stayed on the said land peacefully for over 12 years and no eviction has ever been attempted on them by the Defendants. DW1 did not deny that the Applicants are all using and living on their respective portions. Although the 1st



and Respondents deny the Applicants have been on the land for over 12 years, they did not bring any evidence to state when according to them these people got on to the land. The evidence of each of the Applicants stated that the 1st and 2nd Respondents are not occupying the portions they are claiming and this assertion has not been contradicted. The inference drawn is that the Applicants dispossessed the Respondents of the land on the intention they intended to put the land to use.

44. In a claim for adverse possession, the production of sale agreement is to state the mode of entry into the land. The 1st and 2nd Respondents submitted that the 4th Applicant sale agreement was illegal for being sold land by a person unknown to the Respondents but they did not deny the said 4th Applicant is in occupation without their consent. Secondly, they also took issue with the 5th Applicant's agreement for referring to parcel Apokor/xxx instead of Asinge/xxx. Yet occupation of the suit land without consent of the Respondents has not been controverted. For all the agreements, time started running in their favour after the lapse of the six months when the consent of the LCB was to be procured but was not.
45. The 1st and 2nd Respondents relied on the holding in the case of Saiqua Sultana supra that "... until subdivision is done, the portion of land that belongs to each tenant in their entire parcel which is jointly owned is unidentifiable. In my opinion the position taken by the court in the cited case supports the Applicants' case to the extent that the 1st and 2nd Respondents are precluded from taking a defence that their share cannot be included from the portions being claimed in this suit. The absence of subdivision of the suit parcel cannot be used to defeat a claim for adverse possession since a claimant is required to prove by factual evidence the land they are occupying. Where such proof is made, the court has powers to order for subdivision to carve out the size awarded to a party.
46. Further, the 1st and 2nd Respondents stated that they were awarded a share belonging to their father Omusolo being half of the entire land (approximately 11 acres) As long as the interests of the Applicants were running when they applied and were granted letters of administration, their appointment as or share in the land were subject to those interests. Time does not stop running on the appointment as an administrator because the only way to defeat a claim of adverse possession is by recovery of possession or filing of suit against such a party. None of the Respondents took the two steps that stop time from running. Therefore, whether or not the 1st and 2nd Respondents are entitled to 11 acres, the said portion can be alienated where the parties proved in this case that they have peacefully lived on the land for a period of twelve years.
47. From the evidence on record, the Respondents have been aware of the Applicants presence on the land. In the case of *Koech Kagongo v Chebii Yego* [2018] eKLR, the Court stated as below:

“Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely (a) open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.” (underline mine for emphasis)



48. In upshot of the foregoing evidence and analysis I am convinced that the Applicants have proved their case beyond the balance of probabilities that the possession of the Suit Land was open, actual, continuous and uninterrupted over and beyond the limitation period of twelve (12) years. Accordingly, I enter for them judgement and I so hold that:
- a. That the Applicants be and are hereby declared the owners of land totaling to 11 ½ acres or thereabouts of the parcel of land known as South Teso/asinge/377 in which they have been in actual possession notoriously, adversely, open and uninterrupted for a period exceeding 12 years as demarcated on the ground and itemised below;
 - i. 1½ acres of the LR No South Teso/asinge/xxx in favour of the 1st Applicant;
 - ii. 6 acres of the LR No South Teso/asinge/xxx in favour of the 2nd Applicant;
 - iii. 1¼ acres of LR No South Teso/asinge/xxx in favour of the 3rd Applicant;
 - iv. ¾ of an acre of the LR No South Teso/asinge/xxx in favour of the 4th Applicant,
 - v. 2 acres of the LR No South Teso/asinge/xxx in favour of the 5th Applicant,
 - vi. A ¼ of an acre of the LR No South Teso/asinge/xxx in favour of the 6th Applicant;
 - vii. 1½ acres of the LR No South Teso/asinge/xxx in favour of the 7th Applicant
 - b. That the Respondents be and are directed to execute all documents of transfer of the said 11½ acres or thereabouts in total of all that parcel of land known as South Teso/asinge/xxx in favour of the Applicants as per their respective shares as demarcated on the ground and set out in (a) above within forty (45) days.
 - c. Failure to which the Deputy Registrar of this Court shall execute the same in place of the Respondents and the Land Registrar to dispense with the production of the original title deed if the Respondents do not comply;
 - d. Each party shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JULY, 2022.

A. OMOLLO

JUDGE

