



REPUBLIC OF KENYA



**Onyango v Masinde & another (Environment & Land Case 14 of 2020)
[2022] KEELC 12811 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 14 OF 2020
AA OMOLLO, J
SEPTEMBER 29, 2022
IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE
POSSESSION OF DEFINED PORTION ON LAND PARCEL
BUKHAYO/BUYOFU/615 BY CHARLES NAMWIWA ONYANGO**

BETWEEN

CHARLES NAMWIWA ONYANGO APPLICANT

AND

DOMIANO BARASA MASINDE 1ST RESPONDENT

FELIX WASIKE MASINDE 2ND RESPONDENT

JUDGMENT

1. The Applicant commenced these proceedings by taking out the Originating Summons dated April 29, 2020 against the Respondents under sections 7 and 38 of the *Limitation of Actions Act*. The Applicant's case is that he has acquired by way of adverse possession the land described as LR No Bukhayo/buyofu/615 and posed the following questions for determination:
 - a) Whether the Applicant has been in open, quiet and notorious possession of defined portion of LR No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground for a period of over 43 years exceeding 12 years required in law for acquisition of land by adverse possession;
 - b) Whether the Respondent's entitlement and title to a portion measuring 2.8Ha of LR No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground now measuring 2.8Ha has become extinguished upon expiry of 12 years from the time the Applicant has been in possession since the year 1977;



- c) Whether the Applicant has acquired title to the said portion of land measuring 2.8Ha or any other title derived as on the ground by the virtue of adverse possession and whether such title shall be issued for the portion he possesses;
 - d) Whether mutation should be done for a defined portion LR No Bukhayo/buyofu/615 or any other title therefrom as on the ground and the registration be done accordingly;
 - e) Who should pay for the costs of the application?
2. The Applicant seeks to be granted the following orders:
- a) That the Respondent's right over LR No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground as possessed by the Applicant is extinguished by adverse possession from the time the Applicant acquired the same by virtue of a land sale transaction;
 - b) That the Applicant do and is hereby granted right if title of LR No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground;
 - c) That the Respondents do execute all relevant documents necessary to mutate or carve out define portion as occupied on the ground and in default the Deputy Registrar of the High Court Busia be authorized to do so after expiry of a defined period;
 - d) Costs be borne by the Respondents jointly and severally.
3. The Originating Summons was supported by the Applicant's affidavit dated April 29, 2020 to which he attached a copy of the agreement for sale, a copy of official search, and minutes of a meeting dated June 6, 1977. In his affidavit, the Applicant avers that the Respondents are his neighbours and that on the 6th of June, 1977, the Bafofyo clan agreed to have his father pay for the suit land which was done and the balance cleared on the March 10, 2008. That despite clearing the balance the transfer never happened and the Respondents got title deeds on the February 17, 2020 yet his father had lodged a caution on the land on the December 28, 1994 which caution remains on the title to date. The Applicant contends that he has been living on the land from birth in 1973 and his family lives thereon as well.
4. The Respondents filed separate affidavits with the 1st Respondent filing his Replying Affidavit on the May 18, 2021. He deposed that he was the registered proprietor of LR No Bugengi/buyofu/615 and that the Applicant's father Makokha Onyango encroached on his piece of land as acknowledged by the Area Chief and the District Officer. That the Applicant followed in his father's footsteps and decided to encroach in the 1st Respondent's land by building thereon without consent or approval. That the Applicant's father had filed a suit in Kakamega Civil Case No 28 of 1995 (OS) which suit was dismissed and no appeal was ever preferred. The 1st Respondent urged this Court to dismiss the Originating Summons for being scandalous, vexatious and an abuse of the Court process.
5. The 2nd Respondent filed his Replying Affidavit on the 8th of June, 2021. He reiterated the contents of the 1st Respondent's affidavit and urged this Court to dismiss the Applicant's originating summons as it is an abuse of the Court process.
6. The hearing commenced on the November 22, 2021 with the Applicant relying on his sole evidence and testified as PW1. He adopted the witness statement dated April 29, 2020 as his evidence in chief wherein he stated that they lived on the suit parcel together with his father and siblings. Subsequently, his father gifted him the land and the father moved out to a different parcel. That on the June 6, 1977 the Bafofyo Clan sat and resolved that his father was to pay for the suit land wherefore his father made part payment of the suit land. On the October 17, 1981 the Applicant's father received a demand letter for the balance of the purchase price from Onyinkwa & Co Advocate which balance he cleared on the



March 10, 2008. That despite clearing the balance, all efforts to have him registered as owner of the land were fruitless. This made his father to lodge a caution on the land in the year 1994 and the same was never removed.

7. PW1 stated further that Respondent fraudulently got registered as proprietors of the land on the February 17, 2020 and they started trespassing on his portion he had quietly possessed without interference. He decided to approach the Land Registrar and discovered that the Respondents had registered the titles without first removing the caution and reinstated the caution of December 28, 1994. He concluded by stating that his entire family resides on the suit land and depended on it for his livelihood. He added that they have been in possession of the land for over 40 years without any objection from the Respondents or their agents. He produced the documents on as they appear in his list of documents dated April 29, 2020 as PEx 1-5.
8. Upon cross-examination by the 1st Respondent, PW1 stated that his father bought land from Nyangweso Imanyole who initially purchased the land from the 1st Respondent's father. That his father gave him power of attorney to pursue the claim over the land. He stated that his father completed the payment of the purchase price in 2008 after he received a demand letter indicating that he had delayed in completing payment. He reiterated that he has lived on the land since 1978 and he has never been arrested for trespass or a forcible detainer. PW1 denied ever receiving the Chief's letter dated February 19, 2020 and that he was seeing it in Court for the first time.
9. PW1 was also cross-examined by the 2nd Respondent and he stated that the reason he sued the 2nd Respondent is because he was living on the suit land despite not having sold him the land. That he was not grabbing the land but only claiming the land he bought. In re-examination, PW1 stated that the search shows the suit land is currently registered in the Defendants joint names. This marked the close of the Applicant's case.
10. The defence hearing commenced with the 2nd Respondent, Felix Wasike Masinde testifying as DW1. He stated that the Applicant cannot snatch his land as he has never sold the same to him and the lack of children should not necessitate the land grabbing. On cross-examination, DW1 stated that the 1st Defendant is his nephew and son to Barasa. That no land was sold during his stay on the land. He confirmed knowing the name Nyangweso Imanyole but not recalling whether the land was sold to him. That he has never seen the Plaintiff reside on the land although he has houses, everybody has his own land.
11. Domiano Barasa Masinde testifying as DW2 relied on the contents of his Replying Affidavit filed on the June 8, 2021 and produced the documents annexed thereon as DEx 1-4. He stated that he got a letter from the chief to verify that he is the son of the deceased which he used to obtain the grant. He confirmed that the Plaintiff's father sued him in Kakamega and that case was dismissed. That he has lived on the suit land for 17 years and had the boundaries ascertained. On the contrary, the Plaintiff started living on the land in the year 2020 after he was served with the chief's letter dated November 25, 2019. He confirmed that the land belonged to his father and that he never sold the land to anyone and as such the Applicant should direct his claim towards the estate of Nyangweso. That the Plaintiff encroached on their land without their consent and that this Court should dismiss his case.
12. During cross-examination, DW2 stated that he was not aware that his father sold land to Nyangweso who hailed from the same community as them. That he filed succession proceedings in 1995 and he got title to the land in the year 2020 after the Applicant put up his houses on the land. On being asked why he had not filed a case to evict the Applicant for the land, he stated that he did not because the Applicant filed his case first. He stated further that the Applicant's father wanted to grab the land from 1994 but he did not construct anything thereon until the Plaintiff did.



13. The defence hearing continued on the February 17, 2022 with Chrispinus Ndidi Okwara testifying as DW3. He stated that he was the Assistant Chief of Mungatsi sub location. He confirmed that he was the acting Chief when the 1st Respondent came to him, complaining that the Applicant was building in his land. That he visited the suit parcel the following day in the presence of the Assistant Chief and the village elders. That despite their advice to the Applicant to stop construction on the land until the determination of the suit, the Applicant declined to heed their advice and completed the construction.
14. During cross-examination, DW3 stated that the land parcel was in Buyofu sub-location where he was the acting Chief then. That the 1st Respondent complaint was for trespass and not boundaries and he was shown the Applicant's home when he visited the site. He stated that he had no details of any previous complaints or disputes over the land and neither could he tell how long the Applicant had been on the land. This marked the close of the defence case.
15. The parties were granted time to file their submissions within 21 days each. The Applicant filed his submissions on the March 30, 2022. He submitted one issue for determination: whether the Plaintiff had acquired a portion of 2.8Ha of LR Number Bukhayo/Buyofu/615 by way of adverse possession. While relying on the provisions of section 7 of the *Limitations of Act* Cap 22, he submitted that for one to succeed in a claim for adverse possession, they must prove that they have been in peaceful, continuous and uninterrupted occupation of the claimed land for at least twelve years. He relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR where the court held that:

“ Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the people having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, 12 years.”
16. He further submitted that from the evidence adduced during trial, his father bought a portion of 2.8Ha of the land parcel LR Number Bukhayo/Buyofu/615 from Stephen Nyangweso who had bought the same from the 1st Respondent's father and that in 1977 the Bafofoyo clan sat and decided that his father pay the 1st Respondent father the balance of the purchase price. That the minutes for the clan meeting confirm that his father paid part of the deposit for the land and this is buttressed by the demand letter served on him by Onyinkwa & Co Advocates. That his father took possession of the suit land before the Applicant took over and has been in possession for the last 40 years. He also relied on the case of *Wilson Njoroge Kamau v Nganga Muceru* [2020] eKLR where the Court held that

“ The key test in adverse possession is that the owner of the land has been dispossessed or has discontinued possession of the property.”
17. The 1st Respondent filed his submissions on the March 9, 2022 and submitted that he is the registered proprietor of the land parcel number Bukhayo/buyofu/615 which he acquired in the year 2008. That together with the 2nd Respondent, they have been staying on the suit land. That Makokha Onyango was the first person to encroach on the land and he lodged a caution with the Land Registrar but the same was lifted by the District Officer of Nambale Division. That the Applicant is a trespasser and has no right on the land. The 1st Respondent submitted on the following issues for determination:
 - i) Whether the 1st Respondent acquired the title to the suit land fraudulently;
 - ii) Whether the Applicant has acquired the suit land vide adverse possession; and
 - iii) Whether the Applicant has established conditions for granting of an injunction.



18. With regards to the first issue, the 1st Respondent submitted that despite the Applicant's claim that he has stayed on the land for the last 40 years, he is the registered proprietor of the suit parcel and is protected as such under section 26 (1) of the Land Registration Act. That unless the Applicant can successfully prove any allegations of fraud the same cannot stand. He relied on the case of Koinange & 13 others v Koinange [1968] KLR 23 where the Court held that;

“Allegations of fraud must be specifically pleaded and strictly proved on a standard below reasonable doubt but above the usual standard in civil proceedings, that is on a balance of probabilities.... Parties ought to know that they have an obligation to present a prima facie case of fraud of an illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do.”

19. He submitted that since the Applicant failed to explain how the 1st Respondent was party to fraud in obtaining the title to the suit land, this does not in any way defeat the title. Furthermore, the Applicant failed to establish the fact of fraud or illegality. They relied on the unreported case of Nairobi Permanent Markets Society and 11 others v Salima Enterprises & 2 Others Civil Appeal No 185 of 1997 where the court held that:

“Where it is not shown that a person is a party to any fraud or misrepresentation perpetrated upon another during the acquisition of property nor any averment on the knowledge of being a party to any irregularity over the property.”

20. On the second issue, the 1st Respondent submitted that the Applicant has not shown any proof that he has lived on the suit parcel and that he in fact replied in the negative when cross-examined as to whether he had anything to show for the period he alleged to have been staying on the land. That all the witnesses have testified to the fact that the 1st Respondent is the registered owner of the land and he has been utilizing it since he acquired it in the years 1994. He relied on the case of Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR where adverse possession was explained as follows:

“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 endeavors to interrupt it by way of recurrent consideration.”

21. On the third issue, the Respondent submitted that the Applicant had not met the grounds for granting an injunction as set out in the case of Giella v Cassman Brown [1973] EA 358. That they had not established a prima facie case and as they are not the registered proprietor of the suit land and has therefore has no legal right whatsoever over the suit property. The Respondent stated that the Applicant has tried to obtain that land fraudulently but failed and is therefore a mere trespasser. They urged this Court not to condone trespassing onto the Respondents property and preventing them from using the said land. They relied on the case of Maber Unissa Karim v Edward Oluch Odumbe [2015] eKLR, where it was held that:

“The Court cannot aid a trespasser to continue with his illegal acts of unlawfully occupying the premises rent free when the Plaintiff must have incurred money in acquiring it and it is not receiving any benefit out of it.”



22. The Respondents concluded by submitting that the Applicant only seeks to frustrate the Respondents from enjoying their rights of usus, abusus fuctus as the original proprietor of the suit land. That the suit land has been marred by cases and it will be prudent that the present case be resolved to enable the Respondents to enjoy their land. They urged this Court to dismiss the suit with costs since it is frivolous and a waste of the Court's time.
23. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:
- a) Whether the Applicant has proved his claim for adverse possession over the Suit Land;
 - b) Who bears the costs of this suit?
24. The main issue for determination is whether the Applicant has proved that he has been peacefully and continuously in possession of the suit land for a period of more than 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. Justice Asike Makhandia JA in *Mtana Lewa v 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.”
25. The Applicant's claim is founded on the assertions that his father bought land from one Nyangweso Imanyole on the June 6, 1977. That he paid a deposit of the purchase price the same year and cleared the balance sometime in the year 2008. The Applicant produced as PEx 2, the minutes of Bafofoyo clan held on the June 6, 1997. From a look at the minutes and the preceding exhibit PEx 1, the letter confirming the sale and purchase of the suit land, there was indeed a sale of a portion of the suit land. According to the agreement dated June 20, 1977, the last paragraph stated thus, “Makokha Onyango ananua shamba nusu na nusu nabaki kwa mtoto ya Baraza” The agreement did not disclose the parcel of land being sold but disclosed the land being purchased had earlier been sold to S Nyangweso Imanyole.
26. The minutes of the Bafofoyo clan dated June 6, 1977 disclosed the title of the land under discussion was Buyofu/615 and stated that Makokha Onyango was buying land from Nyangweso Imanyole and some part was to be left for the child of Barasa (last part of page one of the document). The certificate of official search produced by the Applicant show the entire land is measuring 2.8ha. Based on the documents produced by the Applicant, the same does not support his claim for the entire 2.8ha of land as only half of it was sold. Therefore, for his claim for the entire land to succeed, he had to lay a basis on how he came into possession of the remainder half which was sold. The Applicant did not make any attempt at doing so.
27. In establishing the continuous possession, the Applicant averred that their family lived on this land from time of purchase in 1977 and later the same was gifted to him by his father. Has the possession been continuous and peaceful from 1977 to date? The Respondents annexed a copy of proceedings from Kakamega HCCC case No 28 of 1996 filed by Makokha Onyango (Applicant's father) against the present 1st Respondent. This suit was dismissed for want of attendance by the plaintiff on February 18,



2001 (Dex4(a)). The said Makokha attempted to set aside the dismissal order which application was dismissed on March 24, 2004. The case that was dismissed was filed by the purchaser. The registered owner never took out any proceedings to recover the land neither has he made effective entry.

28. Did the filing of this case interfere with the running of the time? I think not and support my opinion with the decision from the case of *Joseph Gathumu Kiritu v Lawrence Munyambu Kabura* Civil Appeal No 20 of 1993 where Kwach JA stated thus;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in *Githu v Ndeete* is important and deserves to be read in full ... time which has began running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or make an effective entry into the land.”

In any event, time would then continue running in favour of the Applicant from April 2004. Thus by the time this suit was filed on May 20, 2020, the 12-year period had lapsed in favour of the Applicant.

29. The next issue the court will look at is whether that occupation has been peaceful. Between 2004 to the year 2020, there is nothing to show of any activity between the two parties. On 19th Feb 2020, the 1st Respondent made a complaint at the Chief’s office that the Applicant was building on his land and pursuant to the complaint, the chief wrote the letter produced as Dex3. The author of that letter gave evidence as DW3 and stated that they visited the suit land the following day and advised the Applicant to stop constructing until the case was determined. DW3 stated that the Applicant refused to heed to his advice. In cross-examination, he stated that the Applicant was building on land adjacent to his home and he could not tell how long the Applicant had lived there.

30. The 2nd Respondent stated that each of them had their respective homes including the Applicant but he could not tell whether the Applicant’s home was also built on the suit land. This means that the occupation/possession of the portion of land where the Applicant has his home has been peaceful. It was his evidence that his home was situated on the suit land. If the Respondents believed that where that home is built is not part of Bukhayo/Buyofu/615, then it was incumbent upon them to bring evidence to contradict such assertion. From the evidence adduced, I find there is a pointer that the Applicant is living on a part of the suit land.

31. In the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal held thus:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee v Wanduru*, [1984] KLR 314 at 319 Madan, JA stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

32. The Respondents in their submissions raised the question of fraud which they also answered as not proved. However, allegations of fraud did not form part of the Applicant’s case. Further, the Respondents testified and submitted that the Applicant is a trespasser on their land, they have not provided any proof that they made any attempts to have the Applicant evicted from the land before



this suit was instituted. Their defence of trespass does not lie on account of length of time they were dispossessed of the land.

33. In upshot of the foregoing evidence and analysis I am convinced that the Applicant has proved his case beyond the balance of probabilities that his possession of a portion comprised in half of the Suit Land was open, actual, continuous and uninterrupted for twelve (12) years. Therefore, I enter judgement in his favour and make the following orders;

a) That the Respondent's right over Half portion of L.R No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground as possessed by the Applicant is extinguished by adverse possession;

b) That the Applicant do and is hereby granted right of a portion comprised in Half of title of LR No Bukhayo/buyofu/615 or any other title derived therefrom as on the ground occupied;

c) That the Respondents shall within a period of thirty (30) days from date of this judgment execute all relevant documents necessary to mutate or curve out the defined portion as occupied on the ground measuring 1.4ha or thereabouts (being half portion of the suit title) and in default the Deputy Registrar of this Court be authorized to do so after expiry of the defined period;

d) Each party shall meet their respective Costs

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

