



Oloo v Opili & another (Being the Administrators of the Estate of Sebastian Emojong Opili) (Environmental and Land Originating Summons E005 of 2021) [2022] KEELC 12691 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12691 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2021

AA OMOLLO, J

SEPTEMBER 28, 2022

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF L.R NO. SOUTH TESO/CHAKOL/1126

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

BETWEEN

VINCENT PADE OLOO APPLICANT

AND

GEORGE OTENGE OPILI 1ST RESPONDENT

AGNES KURESIA OPILI 2ND RESPONDENT

BEING THE ADMINISTRATORS OF THE ESTATE OF SEBASTIAN EMOJONG OPILI

JUDGMENT

1. The Applicant commenced these proceedings vide the Originating Summons dated February 11, 2021 against the Respondents. The Applicant claims that he has acquired 3½ acres of the entire land known as South Teso/Chakol/1126 and posed the following issues for determination:
 - a) Whether the Applicant has been in open and continuous possession of 3½ acres from LR No South Teso/Chakol/1126;
 - b) Whether the Respondents title LR No South Teso/Chakol/1126 became extinguished upon the expiry of 17 years from the time the applicant went into possession of the land;



- c) Whether the Applicant has now acquired the title to the said land by virtue of adverse possession;
- d) Whether the registration of the Respondents as owners of LR NoSouth Teso/Chakol/1126 should be cancelled with a view of giving the Applicant 3½ acres from LR NoSouth Teso/Chakol/1126;
- e) Whether the Respondents, their agents, servants and or any person through them should be permanently enjoined from putting the 3½ acres of LR NoSouth Teso/Chakol/1126 being occupied by the Applicant;
- f) Whether the Deputy Registrar from Honourable Court, should be empowered to sign all the relevant documents to enable the Applicant obtain the title to 3½ acres from LR NoSouth Teso/Chakol/1126;
- g) Who should meet the costs of this suit?

2. The Applicant sought for the following ORDERS:

- a. That the Respondents' rights over 3½ acres from LR No South Teso/Chakol/1126 got extinguished by adverse possession upon expiry of 17 years from the time the Applicant came into the possession;
- b. That the 3½ acres of LR NoSouth Teso/Chakol/1126 the Applicant is in possession/occupation be ordered to be registered in the name of the Applicant;
- c. That the Respondent be ordered to execute all relevant statutory documents transfer of 3½ acres of LR NoSouth Teso/Chakol/1126 in the name of the Applicant and that in default, the Deputy Registrar of this Honourable Court want to execute the same in place of the Respondent;
- d. That the Respondent be permanently barred and or enjoined from taking, using and in any way interfering with the Applicant's said land;
- e. That the costs of the application be borne of the Respondents.

3. The Originating Summons was supported by the Supporting Affidavit of the Applicant all dated February 11, 2021. The Applicant contends that he has been in continuous possession of 3½ acres of the suit land for 17 years and has built a home thereon as well as planting trees and crops. He deposed that all his neighbours and relatives regard him as the real owner of the said portion which is clearly demarcated and the boundaries detained.

4. The Respondents filed a joint Replying Affidavit on the September 28, 2021. The Respondents contend that the claim is scandalous, vexatious and otherwise and abuse of the court process and the same ought to be dismissed with costs. They deposed that the Applicant has never had peaceful possession of the suit land because there have been several disputes and court cases including Succession Cause No Busia HCP&A No 117 of 2014. That most of the issues that have arisen have been due to the acreage of the Applicant's portion of the suit land. The Respondents deposed further that the suit land known as LR NoSouth Teso/Chakol/1126 does not exist as the same has been closed the subdivision done on June 6, 2019. That the only portion demarcated on the ground for the Applicant is 2½ acres and not the 3½ acres he is claiming. That the boundaries for the Applicant's portion were planted in 2015 after a meeting with all the purchasers including the Applicant who agreed to have



their portions reduced to enable the 2nd Respondent and her children inherit a substantial portion of land out of the said estate.

5. The Respondents aver that despite the aforementioned agreement and a consensus arrived at, the Applicant filed an objection in the Succession Court on the August 25, 2018 for annulment of the letters of grant issued to the 1st Respondent. That the Applicant later withdrew his application and the grant was confirmed and new numbers created from the subdivision of the suit parcel. That the Applicant's new parcel is LRNoSouth Teso/Chakol/2551 measuring 1.00Ha (2½ acres). That the 1st Respondent was compelled to add a ½ an acre of the suit land to the Applicant's 2½ acre which the 1st Respondent has confirmed he is still ready to give the Applicant. The Respondents urged this Court to compel the Applicant to take the acreage they have offered him and dismiss the suit.
6. The hearing commenced on the January 26, 2021 with the Applicant testifying as PW1 and the sole witness for the prosecution. He stated that he purchased land from Sebastian Emojong and from his son Boniface Opili. In his written statement he stated that he bought 3½ acres of the suit land but the 1st Defendant took away one acre of the land and he is currently left with 2½ acres which is the portion he is using. He stated that on the one acre of the land he had planted trees and the same is now registered in the name of Grace Amadi. He stated that the he did not join Grace in the proceedings because she was not the one who sold the land to him. During cross-examination, PW1 stated that he sued that 1st Defendant because he was a joint administrator with the 2nd Defendant.
7. The 1st Defendant testifying as DW1 adopted his written witness statement and the Replying Affidavit both dated September 28, 2021 as his evidence in chief. He stated that as an appointed administrator of the deceased's estate he called a family meeting for the sharing of the estate and the Applicant agreed to receive 2½ acres and even paid KShs 4,000 for the survey exercise. DW1 stated that if he gave the Applicant the 3½ acres, demanded the children of Boniface Opili will have no place to stay in. That the Applicant got him arrested at one time because he refused to sign the documents transferring 3 acres of land to him. He concluded by stating that from the minutes of the meeting which he filed Grace wrote a letter stating that she was holding the one acre of land in trust for Boniface's children.
8. Upon cross-examination, DW1 stated that they were four siblings namely: Boniface, Topista, Rosemary and himself. That according to his father's wishes the upper part of the land belonged to the daughters and the lower part to the sons and he shared the land according to the parties' agreement even though the daughters' names are not included in the mutation. He stated further that he has not given any land to Grace and that the said land belongs to Bonface's children. He stated that the Applicant can harvest the trees on the acre of land and leave the land to Bonface's children.
9. Further Defence hearing proceeded on the March 1, 2022 with the 2nd Respondent testifying as DW2. She stated that she did not understand why she was sued in the first place because her husband sold the land without informing her and only asked her to place her thumb print thereon. That her children want land as they have nowhere to live. She stated further that initially the Applicant agreed to take 2½ acres of land and leave one acre to them. That she has no objection to the 2½ acres being given to the Applicant but not the 3 acres since her husband was murdered and left her with young children.
10. Upon cross-examination, DW2 reiterated that it was her husband who approached the Applicant and that they brought her to an office and she signed a document, the consent dated January 7, 2015. That she has not colluded with the 1st Defendant to take away the Applicant's land and that it is her children who are demanding for land. That although she did not deny that the land was sold to the Applicant but her children want the suit portion. She concluded that her husband was buried on the land and her house was still thereon even though she did not know the size it occupied.



11. The parties were ordered to file submissions within a month. The Applicant filed his submissions on the March 25, 2022 which reiterated the contents of his Originating Summons. He submitted that he bought 1.14 Ha (3½ acres) of the Suit Land from Boniface Opili – deceased who was entitled to 2.89Ha of the estate of Sebastian Emojong Opili. He stated that he bought the land 17 years ago and has even established a tree plantation on one acre of the land he bought whose value currently sits at KShs 3,000,000 and also invested heavily on the rest of the 2½ acres of the land. He submitted that the Respondents have trespassed onto his land, cut down some trees and even planted maize on his share of the land. That his 3½ acres of the land have not been allocated numbers in the subdivisions initiated by the Respondent hence his need to file this case. He concluded by stating that the Respondents have likewise disobeyed the Court’s temporary injunction and he urged the Court to enter judgement in his favour and in accordance to the orders sought to safeguard his rights and his share in the suit land.
12. The Respondents filed their submissions on the April 5, 2022 and submitted on one issue for determination ie whether the Applicant’s case is right before this Honourable Court. He submitted that the Applicant came to this court by way of originating summons and that his case is misplaced and frivolous. That the law of Contract which the Applicant came under limits cases to a duration of 10 years and that 17 years have lapsed since the agreement was entered into on the January 26, 2005. The Respondents submitted further that the Applicant did not involve the deceased’s family in the sale transactions yet the law is clear that in such transactions the consent of the family members is paramount. The Respondents submitted that the sale agreements were canvassed because the family members listed thereon did not sign the agreement. That the agreement is not dated hence not clear when the transaction took place and that the deceased, Boniface Opili Emojong could not have executed an agreement to cater for his own burial expenses.
13. That despite this, a family meeting was convened and the family members agreed to have the sale transaction varied to enable the children of the deceased get a share of the estate. That the Applicant also consented to relinquish all of his claims in the succession cause number 117 of 2014 and even executed a consent on the mode of distribution where it was agreed that he gets 1.00Ha. That the Applicant signed all the statutory forms for the processing of the title deeds after the confirmation of grant which was submitted to the lands offices. The Respondents posed a question: whose title and land should be affected for the slicing of the land so that the Applicant gains because all the beneficiaries of the estate now hold titles. They concluded by stating that the Applicant’s case is frivolous and asked this Court to uphold their submissions and dismiss the Applicant’s case with costs.
14. Having considered the parties’ pleadings, evidence and submissions I frame for determination the question of;
 - a. Whether the Applicant has proved their claim for adverse possession for 3½ acres of the Suit Land;
 - b. Who bears the costs of this suit?
15. The defendants in their evidence and submissions concede that the Applicant purchased 3½ acres from the suit title South Teso/Chakol/1126. They argue that the Applicant should only receive 2½ acres out of the 3½ acres purchased so that the children of Bonface Opili – deceased can also receive a portion of their father’s land. The 2nd defendant repeatedly said that it is her children who were demanding for land and urged that the Applicant should harvest his trees on the impugned one acre land and leave it to her children. From this evidence, the Defendants confirm that the Applicant is actually in possession of the contested one acre as he has trees planted on it. The Defendant’s have been aware of his possession. They are barred by law from demanding for the one acre. Section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya, provides that: “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.”

16. The gist of this suit is to ascertain whether or not the Applicant has proved that his occupation has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. 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.”

17. From the evidence adduced at trial, the Applicant bought 3½ acres of the suit land from the Sebastian Emojong and Boniface Opili, the 1st Respondent’s father and brother respectively. He first bought 2 acres (Pex 4) and later added 1½ acres at a total purchase price of KShs105,000/- with the last instalment being paid on the 25th of January, 2005. The Applicant avers that he took possession immediately and has been on the suit land since then making it 16 years since taking of possession. The duration of possession has not been contested by the Respondents. The contention on the part of the Respondents is that the Applicant has not had peaceful possession due to the suits that have been instituted in particular the Busia Succession CauseNo117 of 2014.
18. The succession cause referred as the title of the case was for purposes of administering the estate of Sebastiano Emojong Opili – deceased who was the registered owner of land titleNoSouth Teso/Chakol/1126. It was not a cause commenced to recover land from the Applicant so it did not stop time from running in favour of the Applicant for adverse possession. Further there was no evidence led to show that the occupation of the Applicant was not peaceful and consistent. The defendants referred to several cases but other than citing the succession case, none was pleaded. The minutes of the clan meeting held on July 14, 2017 was urging the Applicant to accept the ½ acre added to him and withdraw the objection proceedings filed in the succession cause to allow distribution. The meeting did not constitute disruption of peace or continuation of the occupation.
19. The Applicant has thus demonstrated as fact peaceful occupation that has been consistent for a period of more than 12 years. In the case of *Kweyu v Omutut* (1990) KLR 709 the Court of Appeal held thus;

“...The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”



20. The 1st defendant argued that all the beneficiaries of the estate of Sebastian – deceased have received their titles and wondered where the Applicant would get land he is demanding. The Applicant already has title for 2½ acres of land out of the 3½ acres claimed. He also stated that the remainder one acre where his trees are, is constituted in the portion registered in the name of Grace Amade indicated in the grant as holding the land in trust for Dan Emojong Opili. This specific portion assigned to Grace Amade is measuring 0.86ha. Therefore, the Applicant was particular on where his remainder one acre is to be curved from. The Respondents defence that the withdrawal of the objection proceedings compromised the Applicant’s claim is without basis because withdrawal of a suit does not deal with merits or otherwise of a suit.
21. In the circumstances of this case, the rights of the Applicant for the 3½ acres could only be extinguished if he freely consented to it and not by virtue of the averments that the children of Bonface Opili were demanding for the land. Therefore, I am satisfied that the Applicant has proved his case on the required standards that he is entitled to receive 3½ acres of land from land parcel South Teso/Chakol/1126. Taking note that the Applicant already received 2½ acres vide title deed number South Teso/Chakol/2551, I make the following final Orders:
- a. The Applicant be and is hereby awarded one acre of land to make his total count of the land at 3½ acres and the additional one acre shall be curved out of LR South Teso/Chakol/2552 currently registered in the name of Grace Amade Emongaeses (holding in trust for Dan Emojong Opili).
 - b. The Respondents having transferred the land to Grace Amade while aware of the Applicant’s interest, the said Grace Amade is directed to execute a transfer for 0.4ha (one acre) out of LR South Teso/Chakol/2552 to the Applicant. In default the Deputy Registrar to so execute the documents.
 - c. The applicant to meet the costs of the sub-division and registration of the one acre into his name.
 - d. Each party to meet their respective costs of the suit.

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

A. OMOLLO

JUDGE

