



**Omodo & 2 others v Osinya & another (Environmental and Land Originating
Summons 30 of 2020) [2022] KEELC 12783 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 30 OF 2020**

AA OMOLLO, J

SEPTEMBER 28, 2022

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

AND

**IN THE MATTER OF LR NO SAMIA/LUANDA/MUDOMA/4446 AND SAMIA/
LUANDA/MUDOMA/4447 (SUBDIVISIONS OF LR NO. SAMIA/LUANDA/MUDOMA/96)**

AND

IN THE MATTER OF A CLAIM BY ADVERSE POSSESSION

BETWEEN

FRANKLIN WERE OMODO 1ST APPLICANT

JOSEPHAT OUMA OSIGE 2ND APPLICANT

**MARY OTENYO OTWOMA (AS THE REGISTERED OFFICIALS
AND TRUSTEES OF THE FELLOWSHIP CHURCH OF CHRIST IN
KENYA) 3RD APPLICANT**

AND

**GILBERT OMONDI OSINYA ALIAS ALBERT OMONDI
OSINYA 1ST RESPONDENT**

MICHAEL ODUORI EGESA 2ND RESPONDENT

JUDGMENT

1. The applicants commenced these proceedings vide their originating summons dated April 29, 2020 against the respondent under sections 7 and 38 (1) and (2) of the *Limitation of Actions Act*. The applicants' case is that it has acquired by way of adverse possession the land parcel measuring 0.16Ha out of the land known as LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/



Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 and posed the following questions for determination:

- a. Whether the applicant has been in open, quiet and notorious possession of land parcel measuring 0.16Ha out of the land known as LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 for a period exceeding 12 years;
 - b. Whether the respondents title to LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 became extinguished upon expiry of 12 years from the time the applicant went into possession of the land: in March, 2001;
 - c. Whether the applicant has now acquired title to 0.16Ha out of the land known as LR No Samia/Luanda/Mudoma/4447 (0.18Ha) and LR No Samia/Luanda/Mudoma/4446 (0.07Ha) being subdivisions of LR No Samia/Luanda/Mudoma/96 by virtue of adverse possession;
 - d. Whether the registration of the respondents owners of the land known as LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 should be cancelled and the applicant registered as the owner of 0.16Ha of the said parcels of land;
 - e. Who should pay costs of this suit?
2. The applicant seeks to be granted the following orders:
- a. That the respondents rights over LR no Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 got extinguished by adverse possession upon expiry of 12 years from the time the applicant came into possession that is from March, 2001;
 - b. That LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 be subdivided and the applicant be registered as the owner of 0.16Ha of the said parcels of land;
 - c. That the respondents be ordered to execute all the relevant statutory documents required of them to facilitate transfer of 0.16Ha out of LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 being subdivisions of LR No Samia/Luanda/Mudoma/96 in default the Deputy Registrar of the court do execute the same in place of the respondents;
 - d. That the respondents, their family members, servants, agents and those claiming through him be permanently barred, restrained and or injuncted from taking using in any way interfering with the applicant's portion of the suit land measuring 0.16Ha; and
 - e. That the costs of this case be borne by the respondent.
3. The originating summons was supported by the applicant's supporting affidavit filed on the July 27, 2020 to which he attached several documents including copies of the green cards for land parcels number LR No Samia/Luanda/Mudoma/96, LR No Samia/Luanda/Mudoma/4446 and LR No Samia/Luanda/Mudoma/4447.
4. The respondents filed separate affidavits with the 1st respondent filing his replying affidavit on the August 27, 2020. He deposed that he is the absolute proprietor of the land parcel number Samia/Luanda/Mudoma/4446 measuring 0.18Ha on the ground. That the applicants have never lived on the



said parcel and as such their claim for adverse possession is misplaced because they occupied the land by way of a sale agreement which is incompatible with the claim for adverse possession. He deposed further that the church is not a legal entity and cannot own or possess land and as such cannot occupy the suit parcels. He prayed for the dismissal of the case with costs.

5. The 2nd respondent filed his replying affidavit on the August 27, 2020. He deposed that he was the legal owner and proprietor of the land parcel known as Samia/Luanda/Mudoma/4447 which he purchased for a consideration. That the Applicants do not own, occupy and or possess any portion of the said suit land and as such their claim is not factual. That the Applicants cannot claim to own the suit parcels by way of adverse possession as they have pleaded that they acquired the same by way of a sale agreement.
6. The hearing commenced on the December 2, 2021 with Pastor Josephat Ouma Osige testifying as PW1. He stated that he was the general secretary and one of the trustees of the applicant. He adopted his affidavit and witness statement filed in court on July, 2020 as his evidence in chief and produced the documents on the applicant's list of documents as PEx1-5. In his statement and affidavit, PW1 stated that the applicant bought 0.16Ha of LR No Samia/Luanda/Mudoma/96 from the 1st respondent for a consideration of KShs 22,000. The consideration was paid in two instalments as follows: on the March 4, 2001 Kshs 10,000 to the 1st respondent (partly used to refund the initial buyer who had paid Kshs 4,500); the last instalment of Kshs 6,000 was paid on the September 7, 2001. That the applicant immediately took possession of the land in March, 2001 by fencing. They later constructed a permanent church building on the premises in the year 2004 and a pastor's house was built thereon in 2010. That the church has been on the land for 19years.
7. That the 1st respondent has sold portions of the original parcel LR No Samia/Luanda/Mudoma/96 to various persons causing subdivisions of the same into LR Nos 4337, 4338, 4366 and 4367. That the church lies on land parcel number Samia/Luanda/Mudoma/4337 which was further subdivided into parcels number 4446 and 4447. That the respondents have unlawfully occupied a portion of the land that the church occupies and they intend to construct a permanent house thereon infringing on and abusing the applicant's rights over the said land.
8. Upon cross-examination, PW1 stated that they had not obtained the title for their land and neither did they have documents to confirm that they had begun the process of acquiring the title. He stated that the church was registered on the August 20, 2009 but in 2001 the purchase was done by the Church of CHrist. That the Church of Christ later changed its name to Fellowship Church of Christ. He stated that there has been a dispute between the two churches over the property. PW1 confirmed the agreements for sale dated March 4, 2001 and September 7, 2001 did not include the parcel number or the size of the land being bought. He stated that the 1st applicant was buying land on behalf of the church.
9. On re-examination, PW1 stated that the 1st applicant was the founder of both churches but the land is currently in possession of the Fellowship Church of Christ. That although they bought the land from Gilbert, Moses and Gilbert shared the same parcel of land and the church's portion is in the middle of the land. That the present suit was instituted after Gilbert sold part of this land to someone else who started fencing their portion of the land.
10. Charles Mudibo testified as PW2 and stated that he knew both the 1st applicant and the 1st defendant. He adopted his witness statement dated November 17, 2020 as his evidence in chief where he stated inter alia, that he bought land from Gilbert Omondi and his brother. That because there were some troublesome neighbours he opted not to develop the land and instead decided to sell it to Frankline Were Omodo who wanted to extend the compound of his church. That Gilbert confirmed that he had been paid Kshs 4,500 for the portion of the land which sum was refunded to PW2 and the balance of



- the purchase price was paid to Gilbert. He confirmed that Frankline acquired the plot which he had initially bought from Gilbert.
11. Upon cross-examination, PW2 stated that the applicant dealt with him as a buyer on behalf of FCCCK in the year 2001. He reiterated that he sold the land because of the dispute with the neighbours although he could not tell whether the applicants were facing similar disputes. He confirmed that Moses Otieno was also present during the sale transaction.
 12. George Ochieng Webere testified as PW3. He stated that he was a pastor who worked in Busia and he knew the 1st applicant and the 1st defendant. He stated that when the 1st applicant had a transaction with the 1st defendant, he was working with CCK under the 1st applicant and he was instructed by the 1st applicant to obtain land for the church. That he then identified the 1st applicant's land and after paying the first instalment they put up a semi-permanent structure with an iron roof.
 13. Upon cross-examination, PW3 stated that he was the one who prepared the agreement dated March 4, 1999 and the person who paid the money was the Church of Christ of Kenya and he paid the first instalment of Kshs 7,300/-. He stated that he did not know whether the balance was paid because he had already been transferred to Nairobi. He confirmed that Moses Ochieng Osinya was present during the transaction. This marked the close of the applicant's case.
 14. The defence hearing kicked off on the February 22, 2022 with Apostle Michael Oduori Egesa testifying as DW1. He adopted the facts deposed to in his replying Affidavit and stated that he is the owner of Parcel Number 4447 which he purchased from the 1st respondent. That the applicant is not using the land and the church is built on a neighbouring parcel of land. He continued in evidence that when he purchased the land, it was open and it is him who fenced it. That at the moment, there is a trench separating his fence and that of the church.
 15. Upon cross-examination, DW1 stated that when he bought the land in the year, 2020, he saw a church on it but he was not aware it belonged to the pastor. That when a surveyor fixed the beacons for him, the beacons did not reach the church's compound. DW1 confirmed that he did not investigate to find out the applicant's plot number but he was told that the applicant bought ¼ an acre. That he saw the agreement between Gilbert and the Church for the purchase of ¼ an acre of land but he did not see an agreement between Gilbert and Mudibo. That from the agreement, the church bought the land in the year 1999. In re-examination, DW1 stated that the agreement he saw was between the Church of Christ and the 1st defendant and that the County Surveyor has never visited the land to determine any boundary dispute.
 16. Moses Justo Othieno testified as DW2 and stated that the 1st defendant was his elder brother and he is disabled and not so well mentally. He stated that he witnessed his brother sell land to the Kenya Church of Christ on the March 4, 1999 and the Church's representative was George. That a deposit of Kshs 7,300 was paid but the balance was never paid, despite numerous requests to the church and even escalating the issue to the Chief, the DO and the DC. DW2 continued in evidence stating that they needed money to take the 1st defendant to hospital necessitating the sale of another portion of the land to the 2nd defendant. He stated that the portion sold to the 2nd defendant was different from what was sold to the church.
 17. Upon cross-examination, DW2 stated that the 1st defendant has been ailing since 1995. That in the year 2020, the 1st defendant was not mentally unstable and as such the affidavit by the 1st defendant sworn on the August 27, 2020 is false. He confirmed that on December 2, 2021 the 1st defendant was very sick. He continued to state further that they were four brothers: Jackton Were, John Jairo, Moses Othieno and Gilbert Omondi Osinya and that Charles Mudibo had bought land from Jackton. That



he was not aware that Charles had sold his land to the church although the land sold to Charles is far away from the suit land while the 2nd defendant's land is two feet away from the applicant's land.

18. Hillary Ochieno testified as DW3 by adopting his witness statement dated November 4, 2021. He stated that he was a pastor with the Kenya Church of Christ in 1989. That the church had an intention of buying $\frac{1}{4}$ an acre of land from the 1st defendant. That after purchasing the land, the church took possession and built a church. That the church is currently known as the Fellowship Church of Christ and has been in possession since 2006. On cross-examination, DW3 stated that he was a witness to the sale transaction and that the money for the purchase was advanced by Franklin Were Omodo. He confirmed that he left the church in 2007 and he was therefore not aware that Bishop Franklin bought an additional $\frac{1}{4}$ acre of land. This marked the close of the defence case.
19. Parties exchanged submissions within 21 days each. The applicant filed its submissions on the September 5, 2022. They submitted on the following issues: whether the applicants bought the suit land from the 1st respondent; and whether the applicant has been in open, quiet and notorious possession of land parcel measuring 0.16Ha of Samia/Luanda/Mudoma/4447 and 4446 bring subdivisions of Samia/Luanda/Mudoma/96 for a period exceeding 12 years. On the first issue, the applicant submitted that based on evidence adduced during trial, it is not in any doubt that they purchased the land from the respondent and paid the entire purchase price as evidenced by Dex 4. That they occupied the land in 2001 on the basis of the land agreement and that its occupation has continued to date openly, without force and without and interruption.
20. With regards to the second issue, the applicant quoted the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the court held that:

“Thus to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claim was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.”
21. The applicant submitted that its entry on the suit property in 2001 was permitted by the 1st respondent after they had cleared the payment of the purchase price. They stated that they have extensively developed the land by building the church and residential houses for their pastors. They admit that the sale agreement was voided by the fact that the vendor failed to get the consent of the Land Control Board within the six months' time period as prescribed by law. That the applicants were already on the parcel during the six-months period as they were put in possession in 2001 immediately after they had completed the payment of the purchase price. They supported their submission by citing the case of *Public Trustee v Wanduru*, where Madan J A stated that;

“...that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years is the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the limitation period can run.”
22. The 2nd respondent filed his submissions on the March 8, 2022. He confirmed that the existence of the sale agreement for the purchase of the land by the applicant. However, he argued that the applicant failed to complete the payment of the balance of the purchase price of Kshs 5,000 which still remains unpaid to date. Save for the unpaid purchase price, the 2nd respondent submitted further that the land Control Board consent was not sought pursuant to the provisions of section 8 of the *Land Control*



Act and this invalidated and rendered void the purchase by the applicant. That the agreement being rendered void therefore means that the Fellowship Church of Christ Kenya has nothing to inherit from the Church of Christ Kenya.

23. The 2nd respondent submitted further that the applicant is not entitled to the prayers sought as they are through the back door seeking for orders of specific performance. The 2nd respondent argued that his parcel is distinct and clearly defined from the applicant's on the ground. That his plot is fenced with posts and a barbed wire, while the church has a hedge around it. That there is no evidence that the 2nd respondent has trespassed or that his land forms part of the church property. The 2nd respondent contends that applicant has not proved their case and he proceeded to cite the provisions of section 107 to 109 of the Evidence Act which imposes a responsibility on whoever alleges a fact to prove the existence of that fact. He urged this court to find no merit in the suit and dismiss the same with costs.
24. I have considered the parties' pleadings, evidence adduced, submissions and case law cited in support of the arguments. 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?
25. 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. 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 J A 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 possession 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.”

26. The applicant's claim is that it bought land from the respondents in the year 2001 vide an agreement for sale dated March 4, 2001 at a consideration of Kshs 22,000/=. DW3 stated that the applicant took possession of the purchased portion immediately after the purchase with the permission of the respondent and proceeded to erect church thereon. He confirmed that he was the applicant's pastor at the time of the purchase. All of the applicants' witnesses confirmed that the land was initially sold to one Charles Mudibo for Kshs 4,500/- and the entire purchase price was refunded. Charles who testified as PW2 confirmed that the purchase price was refunded to him and he handed over the land to the applicant who took possession. The issue of permission in claims for adverse possession was discussed in the case of Samuel Miki Waweru v Jane Njeru Richu, Civil Appeal No 122 of 2001, where the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”



27. Further in the case of *Wambugu v Njuguna* (1983) KLR 172 the court held;

“Where the claimant is in exclusive possession of the land with leave and license of the appellants in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

28. The applicant’s entry into the suit land was vide an agreement for sale which is governed by the Laws of Contract. DW2 confirmed that the transaction did occur but the applicant did not complete the payment of the purchase price, necessitating the transaction with DW1. However, PEx 4b an agreement dated September 7, 2001 confirmed that the 1st respondent had received the entire purchase price. DW2 was one of the witnesses to the said agreement. Regardless of this, this court is estopped from dealing with the issue of the contract due to the limitation of time as provided by 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:

(a) actions founded on contract.”

29. The respondents have also alluded to the fact that the transaction was voided by the failure of the parties to obtain the Land Control Board consent since the land is agricultural land. Section 6 of the *Land Control Act*, cap 302 provides thus:-

Transactions affecting agricultural land

(1) Each of the following transactions that is to say -

- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (LN 516/1961) for the time being apply;

...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”

30. The Court of Appeal extensively discussed the issue of land control board consents in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR as follows:

“A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2))...”

31. The Court of Appeal in the *Willy Kimutai Kitilit* (supra) case agreed with its decision rendered in the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR that



the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case and that upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance. Although the respondents did not obtain the Land Control Board consent for the applicant, they ably did that while transacting with DW1. Nothing therefore stops this court from inferring a constructive trust despite the fact that the Land Control Board consent was not sought but the purchase price was paid in full and the applicant granted possession of the sold portion. The case of *Odd Jobs v Mubia* [1970] EA476, empowered courts to base their decision on an unpleaded issues if it appears from the cause followed at the trial that the issue has been left to the court for decision.

32. Furthermore, in the case of *Jeremiah Kiilu Maitha v Agnes Ngeki Mutie* [2018] eKLR the court stated that;

“In a situation where a sale agreement is null and void for want of the consent of the board, a purchaser can still succeed to have such land registered in his favour if he proves that he took possession of the land and has been in such possession continuously, exclusively, peacefully and with the knowledge of the registered owner for a period of twelve (12) years.”

33. As discussed in case of Samuel Miki Waweru (supra), in cases where permission is granted, adverse possession begins when the permission lapses, same position was also discussed in the case of Public Trustee v Wanduru (supra). From the evidence adduced, the applicant took possession of the land on the March 4, 2001 but the purchase price was completed on the September 7, 2001 and as such started running after the lapse of the period within which consent of the Land Control Board was to be acquired that is from the May 7, 2002.

34. By the time of bringing the present suit, the applicant had been in possession of the suit land for 19 years therefore the period of limitation, which was September 6, 2013 extinguished the respondents' title with regards to the suit portion. The title was extinguished by dint of section 17 of the *Limitation of Actions Act* which provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

35. In upshot of the foregoing evidence and analysis I am convinced that the applicant has proved its case beyond the balance of probabilities that their possession of the suit land was open, actual, continuous and uninterrupted for nineteen (19) years. Consequently, I so hold that:

- a. The applicant's originating summons dated April 29, 2020 succeeds.
- b. The respondents execute transfer documents for 0.16Ha out of the land known as LR No Samia/Luanda/Mudoma/4447 (0.18Ha) and LR No Samia/Luanda/Mudoma/4446 (0.07Ha) in favour of the applicant within thirty days failure to which the Deputy Registrar shall execute the same to facilitate the registration of the said portion in the name of the applicant;
- c. An order of permanent injunction is hereby issued restraining the respondents, their family members, agents, servants, employees and all persons claiming through them from interfering with the applicant's use of 0.16Ha out of the land known as LR No Samia/Luanda/Mudoma/4447 and LR No Samia/Luanda/Mudoma/4446 or the resultant title; and



d. Each party shall bear their own costs.

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

A. OMOLLO

JUDGE

