



**Okumu (Suing as the administrator of the Estate of Bonface Okumu  
Opondo - the Deceased) v Onyango & 5 others (Environment & Land Case  
E002(OS) of 2021) [2022] KEELC 13602 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13602 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E002(OS) OF 2021  
AY KOROSS, J  
OCTOBER 13, 2022**

**BETWEEN**

**PHILIP ODUOR OKUMU ..... PLAINTIFF  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF BONFACE OKUMU  
OPONDO - THE DECEASED**

**AND**

**HELDA OBWARO ONYANGO ..... 1<sup>ST</sup> DEFENDANT  
STEPHEN OUMA LWANDA ..... 2<sup>ND</sup> DEFENDANT  
CHARLES OTIENO LWANDE ..... 3<sup>RD</sup> DEFENDANT  
ROSELINE ATIENO OMONDI ..... 4<sup>TH</sup> DEFENDANT  
EVANS ODHIAMBO WILLIAM ..... 5<sup>TH</sup> DEFENDANT  
OSCAR OKECH AKUK ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By an originating summons dated September 23, 2021, the plaintiff who held a limited grant of letters of administration ad litem authorizing him to institute suit on behalf of the estate of his deceased father Bonface Okumu Opondo (hereinafter “Bonface”) instituted suit against the defendants. He sought several reliefs against them, *inter alia*;
  - a. The plaintiff as the legal representative of the Estate of Bonface be registered as the proprietor of land parcel No East Ugenya/Kathieno “B”/455 (hereinafter “suit property”) now subdivided into East Ugenya/Kathieno “B”/1608, 1609 and 1610 (hereinafter “subdivided portions”)



having acquired ownership and/or title thereto by adverse possession and the titles of the defendants be declared as having been extinguished;

- b. The purported registration of the 1<sup>st</sup>-4<sup>th</sup> defendants as the proprietors of the suit property and any subdivided portions be deemed illegal, null and void and that their actions be deemed as not in any way affecting the proprietary interest of the plaintiff;
  - c. The deputy registrar of this honourable court be at liberty to execute all the necessary transfer instruments with respect to the aforesaid parcels of land in favour of the plaintiff within 30 days from the date of judgement;
  - d. A permanent injunction do issue against the defendants jointly and severally and either by themselves, agents, servants, employees or anyone claiming through them from taking possession, tilling, trespassing, selling, alienating or in any way interfering with the plaintiff's possession, use and occupation of the suit property and its subdivided portions; and
  - e. Costs of this originating summons be provided for.
2. The summons was supported by the affidavit of Phillip Oduor Okumu (hereinafter "plaintiff"). He annexed several attachments which included inter alia, Bonface's death certificate; limited grant of letters of administration ad litem; green cards for the suit property and that of East Ugenya/Kathieno "B"/1608 (one of the subdivided portions); a letter to the land registrar, siaya county; certificates of official searches for the subdivided portions and a demand letter from the defendants' counsel Odhiambo Odera Ass Advocates. He produced these documents in support of his case.
  3. In his supporting affidavit, the plaintiff deponed, *inter alia*, Bonface died on November 5, 2014. The suit property had been bequeathed to him (Bonface) by Nyawara Owera (hereinafter "Nyawara") in the year 1974 as compensation for a fine he paid for the release of Nyawara from jail. The suit property was on 1<sup>st</sup> registration registered in the names of Nyawara and Oduor Achar (hereinafter "Oduor").
  4. Upon taking possession, Bonface developed the property and possessed it until his demise. He [plaintiff] continued occupation and possession of the suit property until its interruption by the 5<sup>th</sup> defendant in the year 2019. He deponed that he had an access road that traversed the suit property that adjoined his parcel of land known as East Ugenya/Kathieno "B"/456 [456] and that his homestead was partly on the suit property. He averred that he and Bonface had occupied and possessed the suit property from 1974 to the date of filing suit.
  5. He deponed that the 1<sup>st</sup> to 4<sup>th</sup> defendants unprocedurally caused themselves to be registered as proprietors of the suit property on April 11, 2018 without first obtaining letters of administration in respect of the estates of Nyawara and Oduor who had since died. Upon this registration, they severed them into the subdivided portions. They then transferred the subdivided portions, as follows; East Ugenya/Kathieno "B"/1608 and 1610 to the 5<sup>th</sup> defendant and East Ugenya/Kathieno "B"/1609 to the 6<sup>th</sup> defendant. He averred that the registered proprietors' title to the suit property had extinguished and their purported transfers were null and void.
  6. The originating summons was opposed by a flurry of replying affidavits by the defendants. The 1<sup>st</sup> defendant who was the daughter of Nyawara filed hers dated October 28, 2021. She deponed, *inter alia*, the plaintiff was the owner of 456 and they had never had a dispute until she subdivided the suit property; her father, Nyawara, had never notified her that he had sold the suit property; the property was registered as a tenancy in common and it was not feasible for one tenant to dispose of the property without consent of the co-tenant; her and her family and that of Oduor had been in continuous possession and occupation of the suit property from the date of 1<sup>st</sup> registration; there was



no evidence of an agreement between the Bonface and Nyawara; she together with the family of Oduor had subdivided the suit property and sold the subdivided portions to the 5<sup>th</sup> and 6<sup>th</sup> defendants; the plaintiff was present during the sale and did not object to the 5<sup>th</sup> and 6<sup>th</sup> defendants' entry into the entire portion of the suit property; the plaintiff commenced minor encroachment on East Ugenya/Kathieno "B"/1610 in the year 2021; the orders sought by the plaintiff would amount to eviction of the 5<sup>th</sup> to 6<sup>th</sup> defendants who were innocent purchasers for value. Some of the documents that she annexed to her affidavit were similar to those of the plaintiff save for the green card of 456. She produced these documents in support of her case.

7. The 4<sup>th</sup> defendant on the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a replying affidavit of even date. She was a daughter in law of Oduor while the 3<sup>rd</sup> and 4<sup>th</sup> defendants were Oduor's sons and they were all beneficiaries to the estate of Oduor. She largely reiterated the averments of the 1<sup>st</sup> defendant and I need not replicate them. She deponed that she and the 3<sup>rd</sup> and 4<sup>th</sup> defendant sold East Ugenya/Kathieno "B"/1608 and 1610 to the 5<sup>th</sup> defendant whilst the 1<sup>st</sup> defendant sold East Ugenya/Kathieno "B"/1609 to the 6<sup>th</sup> defendant.
8. The 5<sup>th</sup> defendant filed a replying affidavit of even date and deponed, *inter alia*, he conducted due diligence before he purchased East Ugenya/Kathieno "B"/1608 and 1610 in the year 2019 for Kshs 700,000/-; he had built a homestead on these subdivided portions and cultivated on them; the plaintiff encroached approximately 0.03 hectares after he had taken over possession and occupation; his advocates issued a demand notice to the plaintiff to desist encroachment and immediately thereafter, the plaintiff instituted this suit; the plaintiff had never been in occupation and he was an innocent purchaser for value. He annexed the agreement of sale to his affidavit which he produced as evidence in support of his case.
9. The 6<sup>th</sup> defendant filed a replying affidavit of even date and deponed, *inter alia*, that upon carrying out due diligence, he purchased East Ugenya/Kathieno "B"/1609 from the 1<sup>st</sup> defendant for Kshs 200,000/=; he had planted eucalyptus trees thereupon; he had been in quiet occupation and possession; when he took over possession, there was no evidence of prior occupancy and he was an innocent purchaser for value.

### **Plaintiff's Evidence**

10. The plaintiff testified as PW1, he adopted his witness statement as his evidence in chief. It was almost similar to his affidavit in support of the summons. He urged the court to find that his title to the suit property accrued in the year 1986 which was the end of the statutory 12-year period. That Bonface fenced the suit property upon taking possession and upon his (Bonface's) demise, he and his brother one Joseph Juma Okumu who testified as PW2 made use of the suit property. However, his brother on July 3, 2016 sold a half acre portion of the suit property to one Eunice Adhiambo Owino who testified as PW4. His brother had put a restriction over the suit property on July 8, 2015 which he withdrew on April 4, 2018. He averred that he had been in occupation of the suit property.
11. On cross examination, he testified that Bonface had other parcels of land adjacent to the suit property; 456 and East Ugenya/Kathieno "B"/457 (hereinafter "457"). That Nyawara and Oduor occupied other neighbouring parcels of land. Nyawara was his relative whilst Oduor was not and that he did not have the agreement that was allegedly executed between Bonface, Nyawara and Oduor. He witnessed the agreement of sale between PW2 and PW4. The plaintiff's evidence was led by several other witnesses.
12. PW2, Joseph Juma Okumu adopted his witness statement and testified that prior to the demise of Bonface, he (Bonface) apportioned the suit property to the plaintiff and himself. With the blessings of Bonface, he sold a portion of the suit property to one Ann Rita. A portion of the suit property was



- also bought by the 5<sup>th</sup> defendant in 2018. He sold an unmeasured portion to PW4 who resided on the suit property. The 6<sup>th</sup> defendant had not taken possession of the suit property.
13. During cross exam, it was his testimony that he was not present when the agreement was entered into between Bonface and Nyawara and that Bonface gave him a portion of the suit property in the year 2012. The plaintiff did not witness the agreement of sale between him and PW4, however, PW3 did. The plaintiff lived in the suit property and 456. The portions of the suit property that he did not sell were sold by the 1<sup>st</sup> defendant.
  14. During re-exam, he testified that there had never been a fence separating the suit property, 456 and 457.
  15. PW3, Julius Ng'ong'a Akut adopted his witness statement. He testified he was a retired area assistant chief. He never knew Nyawara or Ochar. He knew Bonface planted trees and crops on the suit property from the 1970's to the time of his demise. During this period, there had never been any disputes over the suit property. After Bonface's demise, the 1<sup>st</sup> defendant approached him that she wanted to sell the suit property; he urged her not to. He told PW2 to investigate the registration status of the suit property and lodge a caution.
  16. On cross exam, he testified that he never knew if the suit property belonged to Bonface. Bonface never built a home but merely farmed on it. He never witnessed an agreement between the PW2 and Ann Rita. The plaintiff took over possession of the suit property upon Bonface's demise. In re-exam, he testified that Bonface fenced all parcels of land; the suit property, 456 and 457.
  17. PW4, Eunice Adhiambo Owino, adopted her witness statement. It was her testimony that Bonface had fenced the suit property and she bought a portion of it from PW2. She purchased one quarter of an acre. At the time of purchase, she found one Hendrica Awino Onyango in occupation of the suit property who had allegedly bought a portion from PW2. The 5<sup>th</sup> defendant allegedly encroached on the portion sold to her by fencing, farming and constructing. When she testified in court she contended that she bought half an acre from PW2. She had been sued by the 5<sup>th</sup> defendant in Ukwala PMCC ELC No E010 of 2022.
  18. On cross exam, she testified Bonface had constructed a home on the suit property which was still in existence.
  19. PW5, Veronica Awino Opiyo adopted her witness statement. She testified that she was present when Nyawara handed over the suit property to Bonface and the family of Nyawara never laid a claim during Bonface's lifetime. In cross exam, it was her testimony that Bonface started utilizing the suit property prior to the gifting. Her testimony was corroborated by PW6, Andrew Oyango Odhiambo. In his (PW6) cross exam, he testified that Bonface started using the suit property after the gifting.
  20. PW7, Aloice Obaga Wenya, corroborated the testimony of the other witnesses that Bonface farmed on the suit property from the year 1970's to the date of his demise. During cross exam, it was his testimony that the suit property was registered in Bonface's name.

### **Defendants' Evidence**

21. The defendants adopted their witness statements which more or less reflected the averments of their replying affidavits. Therefore, this court will dwell much on their oral testimonies. They produced documents in support of their case.
22. DW1, Oscar Okech Akuk, the 6<sup>th</sup> defendant testified that the agreement of sale between him and the 1<sup>st</sup> defendant was dated June 5, 2019 and that he had developed East Ugenya/Kathieno "B"/1609 by



- planting eucalyptus trees along the boundary. He never knew who had been in occupation prior to the purchase.
23. During cross examination, he testified that he did not find any structures on East Ugenya/Kathieno "B"/1609 and that Bonface was his relative; a great uncle. The 5<sup>th</sup> defendant lived on the suit property but he did not know if PW4 lived there too. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants became known to him after the suit had been filed.
  24. DW2, Helda Obwar Onyango, the 1<sup>st</sup> defendant testified that the plaintiff was known to her and they were neighbours. The suit property belonged to Nyawara and Oduor and she had never been privy that Nyawara had been imprisoned. She and the heirs of Oduor subdivided the suit property and she sold her portion to the 6<sup>th</sup> defendant.
  25. During cross examination, she testified that she did not know when Nyawara died but her parents never lived on the suit property; it had remained idle. She did not know if Bonface used the suit property. She entered into an oral agreement of sale with the 6<sup>th</sup> defendant whilst the 5<sup>th</sup> defendant was given some of the subdivided portions for free. It was only the 5<sup>th</sup> and 6<sup>th</sup> defendant who lived on the suit property. Though she instituted succession proceedings in Ukwala Law Courts, she did not have copies of the confirmation of grant. She had obtained a consent from the land control board but did not know if she received a title document.
  26. DW4, Roseline Atieno Omondi, the 4<sup>th</sup> defendant, who had authority from the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, testified that the families of Nyawara and Oduor utilized the suit property before she started utilizing it upon their demise. However, Oduor never lived on the suit property. The plaintiff and Bonface lived on an adjoining parcel of land and had never utilized the suit property. She had conducted succession proceedings on Oduor's estate. She, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants subdivided the suit property and sold some of the subdivided portions. She lodged a caution on the suit property on the advice of the plaintiff who intended to purchase it. However, she withdrew the caution when she wanted to sell portions to the 5<sup>th</sup> defendant. The plaintiff was present when the suit property was being subdivided.
  27. On cross examination, she testified that she got married after the demise of Nyawara and Oduor and at that time, her mothers in law cultivated the suit property. None of Nyawara's family members used the suit property. The administrator of the estate of Oduor was the 2<sup>nd</sup> defendant. However, she did not have documents in court to confirm this. PW4 lived on the suit property after she purchased a portion from PW2.
  28. DW5, Evans Odhiambo William, the 5<sup>th</sup> defendant testified that he bought East Ugenya/Kathieno "B"/1608 and 1610 after they had been subdivided and it had previously been registered in the names of the 1<sup>st</sup> to 4<sup>th</sup> defendants. He lived on these parcels of land and he had put up a home and planted trees. In his absence, the plaintiff encroached on his land by approximately 50 by 50 feet.
  29. On cross examination, he testified that he never knew PW4 or one Alfred Ouma Masawa but he had sued certain people in Ukwala law courts. During purchase, he found one Ouma and an unknown person occupying his parcels of land. He did not receive any free parcel of land from the 1<sup>st</sup> defendant but he paid the entire purchase price.

#### **Parties Written Submissions.**

30. As directed by the court, the plaintiff's counsel Mr Sambu filed written submissions dated June 29, 2022. Counsel identified 4 issues for determination; (i) whether the plaintiff had been in occupation of the suit property from the year 1970's to the year 2014 (ii) whether the plaintiff had acquired title by way of adverse possession (iii) whether the 5<sup>th</sup> and 6<sup>th</sup> defendants could plead the defence of innocent



purchaser for value without notice of defects in the 1<sup>st</sup> to 4<sup>th</sup> defendants title and (iv) what appropriate orders could be granted.

31. On the 1<sup>st</sup> issue, counsel submitted that the plaintiff's evidence was consistent that Bonface utilized the suit property from the year 1974 to the date of his demise and it was only interrupted by the 5<sup>th</sup> and 6<sup>th</sup> defendants. While the defendants' testimony was full of contradictions.
32. On the 2<sup>nd</sup> issue, he submitted that from the evidence adduced, it was clear that the plaintiff had been in continuous, uninterrupted possession of the suit land from 1970's which were inconsistent with the rights of the registered owners and that the rights of Nyawara and Oduor were extinguished either on December 31, 1986 or December 31, 1992; the latter time accruing from when the 4<sup>th</sup> defendant got married to Oduor's son. He relied on the cases of *Jacob Mwambo Wangora v Mary Waruga Wokabi & 3 others* [2018] eKLR and *Simion Kimagut Biwott & another v Zakaria Kemeli Koima* [2019] eKLR.
33. On the 3<sup>rd</sup> issue, it was counsel's submissions that the 5<sup>th</sup> and 6<sup>th</sup> defendants were not innocent purchasers for value because the real estate agent in their transactions and that of between PW2 and PW4 was one John Akuk Okech. Additionally, it was highly probable that the 1<sup>st</sup> to 4<sup>th</sup> defendants did not take out letters of administration in respect of Nyawara and Oduor's estates and their actions contravened section 45(1) of the *Law of Succession Act*. He placed reliance on the case of *Esther Matoke Mogaka v Richard Ondieki Makori & 2 others* [2022] eKLR where the court stated that in the absence of letters of administration, a transfer of land contravened the provisions of section 45 of the said Act.
34. On the 4<sup>th</sup> issue, the plaintiff prayed that the reliefs sought in the originating summons be granted.

#### **The Defendant's Submissions**

35. When the defendants closed their case, the court gave their counsel Mr Odera timelines to file his written submissions. Despite service by Mr Sambu, he did not comply. When counsel appeared before on July 12, 2022, he sought for an extension of 7 days. The court accommodated him. As this court pens down this judgment, the defendants have not complied with the directions of the court and if at all, the submissions will be filed, which as at now it has not, this court will consider them as having been filed out time and will not examine them.

#### **Analysis And Determination**

36. I have considered the parties' pleadings and evidence and the plaintiff's submissions and in my considered view, the issues falling for determination are; (i) whether the plaintiff had been in occupation of the suit property (ii) if (i) is in the affirmative whether there was interruption of continuous possession and occupation. (iii) whether the transfer of the suit property from Nyawara and Ochar to the 1<sup>st</sup> and 4<sup>th</sup> defendants and subsequently to the 5<sup>th</sup> and 6<sup>th</sup> defendants was free from fraud and illegalities (iv) what appropriate orders should be granted? and (v) who should bear the costs of this suit?
37. Some of the statutory underpinnings of the doctrine of adverse possession are set out in the *Limitation of Actions Act* and the *Land Registration Act*.
38. Section 7 of the *Limitation of Actions Act* intimates that a proprietor cannot, after 12 years, recover land that had been acquired by adverse possession. Section 13(1) of the said Act states that an adverse possessor must be in possession of land in order for a right of adverse possession to arise. Section 13(1) of the same Act states that if the adverse possession is interrupted, the period of adverse possession starts running afresh when the adverse possessor again takes possession of the land.



39. Section 17 states that, “subject to section 18, 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”.
40. Sections 38 (1) and (2) of the *Limitation of Actions Act* states that “where a person claims to have become entitled by adverse possession to land, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.
41. Section 28 (h) of the *Land Registration Act* recognises that all registered land is subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
42. The decision of *Jacob Mwanto Wangora v Hezron Mwando Kirorio* (supra) that was cited by the plaintiff’s counsel indeed captures the settled principles of adverse possession. In this decision, Christine Ochieng J, expressed herself thus on the principles of adverse possession;
- “For adverse possession, to mature into title to land the following conditions must be fulfilled: 1.The trespasser has to demonstrate that he/she has been in continuous and uninterrupted possession without the consent of the owner of the land; 2.The trespasser’s interest has to be inconsistent to the interests of the true owner of the land; 3. The possession has to be open and notorious, to enable the owner be on notice that there is a trespassing on his/her land; 4.The possession has to be actual, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.5. The possession has to be exclusive, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses”
43. I will now proceed to juxtapose the facts of this case to the established legal framework in answering the identified issues which I shall deal with sequentially.

#### **Whether The Plaintiff Had Been In Occupation Of The Suit Property**

44. The plaintiff and PW2 testified that the suit property was gifted by Nyawara and Oduor to Bonface after Bonface had allegedly secured Nyawara’s release from prison for an alleged assault against his brother one Omondi Osore. In cross examination the plaintiff testified that Bonface occupied the suit property prior to the gifting. PW5 who allegedly witnessed the gifting testified in her exam in chief that Bonface occupied the suit property after the gifting while in her cross exam, she contradicted herself and testified that Bonface occupied the suit prior to the gifting. PW6 who was allegedly privy to the circumstances of the gifting testified that Bonface occupied the suit property after the gifting. These contradictions throw a shadow of doubt on the circumstances under which Bonface entered the suit property. Neither a gifting agreement nor a citation of the alleged criminal proceedings were produced. Despite calling close to 7 witnesses to testify in support of his case, the plaintiff did not bother to call the alleged victim Omondi Osore or any of his family members to corroborate his testimony or that of his witnesses. In my honest view, their testimony on the circumstances under which Bonface entered the suit property was untruthful. However, I must answer whether Bonface was in occupation and possession of the suit property.
45. The plaintiff’s testimony and that of his witnesses were consistent that Bonface conducted subsistence farming on the suit property and he had fenced the suit property from the 1970’s. PW2 and PW4



testified that Bonface constructed a house on the suit property. PW3 testified that a house had never been built there by Bonface.

46. The 1<sup>st</sup> defendant testified that the suit property was idle and she was not privy if Bonface used a portion of it. During cross examination, she testified that upon Bonface's demise, the land became hers. This alludes that she was aware that Bonface had been utilising it. The 4<sup>th</sup> defendant testified that when she got married in 1980, she found her late husband Nicholas Omondi together with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the suit properties. On cross examination she contradicted herself and testified that her mothers in law were the ones cultivating it. The testimonies of the plaintiff and his witnesses were consistent and credible that Bonface cultivated on the suit property. The 1<sup>st</sup> defendant's testimony held credence to this. Having evaluated the evidence, I am satisfied that Bonface occupied and possessed the suit property by cultivating it. From the evidence adduced, the consistent decade of occupancy was 1970 and this court shall peg the date of occupancy as from December 31, 1979 which is the last date of the 1970's.

## **II. Whether there was interruption of continuous possession and occupation of the suit property**

47. A mere adverse claim to the suit property for the period required to form the bar is not sufficient. The other principles have to be met. The plaintiff testified that he took over possession of the suit property upon Bonface's demise. However, the evidence on record depicts otherwise. Bonface's occupancy took a turn immediately upon his demise. PW2 testified that he sold a portion to one Ann Rita in the year 2012 which was 2 years prior to Bonface's demise. None of the witnesses led evidence that she had ever occupied or possessed the suit property and, in my view, she had never been in occupation.
48. Upon Bonface's demise, circumstances changed. There was scramble for the suit property either by PW2, the 1<sup>st</sup> to 4<sup>th</sup> defendants or 3<sup>rd</sup> parties. Every one of them wanted a slice of the pie. There was PW4 who allegedly purchased a portion of the suit property from PW2, the 6<sup>th</sup> defendant who bought East Ugenya/Kathieno "B"/1609 from the 1<sup>st</sup> defendant and 5<sup>th</sup> defendant who bought East Ugenya/Kathieno "B"/1608 and 1610 from the 2<sup>nd</sup> to 4<sup>th</sup> defendants. The 5<sup>th</sup> defendant testified that prior to him buying East Ugenya/Kathieno "B"/1608 and 1610, he found certain persons occupying these portions of land; one was Ouma and the other was unknown to him. The testimony of the 5<sup>th</sup> defendant was not controverted.
49. The 5<sup>th</sup> defendant testified that the plaintiff encroached on the suit property after his alleged purchase by moving his fence from 456 inwards towards East Ugenya/Kathieno "B"/1608 and 1610 by approximately 50 by 50 feet. The plaintiff testified that the defendants had blocked an access road that led to his house that was partly on the suit property and on 456.
50. In my view, the plaintiff's evidence of an access road demonstrates that the plaintiff did not occupy and possess the suit property upon Bonface's demise but rather he used the suit property to access his house which was allegedly on 456 and the suit property. He did not disclose when he allegedly constructed his house. The plaintiff neither produced a photograph to demonstrate that such a house existed as alleged nor what size of the suit property he occupied. It is suspicious that despite the 5<sup>th</sup> defendant occupying East Ugenya/Kathieno "B"/1608 and 1610 and even constructed a house, the plaintiff took close to 2 years before filing this suit which was in my honest deduction, was triggered by the demand letter that was issued to him by the defence counsel Mr Odera.
51. The plaintiff's counsel argued that the agreement of sale between PW2 and PW4 was a confirmation that the plaintiff was in adverse possession. Nay, a claim for adverse possession becomes ripe once an adverse possessor is registered as a registered owner pursuant to a court order subject to any unextinguished entry on the register and not otherwise. From the evidence, the plaintiff's occupation



and possession was interrupted when these several 3<sup>rd</sup> parties including PW4 and the 5<sup>th</sup> defendant egressed on the suit property. In fact as it is, this court is constrained to determine how many people are in occupation and the respective sizes they occupy.

52. Having evaluated the said adduced evidence and also considered the applicable law, I find that the plaintiff did not prove his case on a balance of probabilities to enable this court declare that he had acquired title to the suit property by virtue of being in adverse possession.

### **III. Whether the transfer of the suit property from Nyawara and Ochar to the 1<sup>st</sup> and 4<sup>th</sup> defendants and subsequently to the 5<sup>th</sup> and 6<sup>th</sup> defendants was free from fraud and illegalities**

53. Section 26 of the [Land Registration Act](#) states that courts shall *prima facie* deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.

54. The plaintiff pleaded that the registration of the defendants was illegal and unprocedural because they were effected after Nyawara and Ochar's demise without succession proceedings being conducted on their respective estates. I agree with plaintiff's counsel that the register does not reflect that the transfer from the names of Nyawara and Ochar to the 1<sup>st</sup> to 4<sup>th</sup> defendants was by way transmission. Contrary to laid down procedures, the "consideration and remarks" section was left blank. In the case of [Mary Ngonyo Kiume v Charles Muisyo David & 2 others: Exams Housing Cooperative Society Limited \(interested party\)](#) [2022] Angote J, expressed himself thus;

"It is trite that when the certificate of title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title..."

55. The 1<sup>st</sup> to 4<sup>th</sup> defendants did not produce evidence that they obtained confirmation of grants to enable them transact on the suit property. Having evaluated the evidence adduced, the defendant's actions amounted to intermeddling with the estates of deceased persons contrary to the provisions of section 45(1) of the [Law of Succession Act](#) which provides as follows;

"Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person".

56. I am persuaded by the decision of [Martha Wangui Thurura & another v Henry Gitahi Thurura & 3 others](#) [2021] eKLR which held thus;

"the 1st defendant's title was null and void abinitio as it contravened the provisions of section 45 of the [Law of Succession Act](#) cap 160. If this court were to validate the 2nd defendant's title, it would amount to abetting a criminal act under section 45(2) cap 160"

57. That being so, it is my finding that the 1<sup>st</sup> to 4<sup>th</sup> defendants failed to prove to the required standards the root of their title documents and therefore any transactions that ensued therefrom were null and void *abinitio*. Further, the 5<sup>th</sup> defendant admitted that he found some people in occupation of the suit property prior to his purchase whilst the 6<sup>th</sup> defendant did not produce an agreement of sale. Therefore, their defence of innocent purchaser for value does not hold water. Additionally, I find that East Ugenya/Kathieno "B"/455 was illegally subdivided and it therefore follows that the ensuing title deeds; East Ugenya/Kathieno "B"/1608, 1609 and 1610 were illegally acquired.



58. What orders should this court grant? This court dismisses the plaintiff's claim of adverse possession. However, section 80 of the Land Act empowers this court to order the rectification of a register of a suit property directing it be cancelled. Consequently, I shall revert the suit property back to the names of the original proprietors; Nyawara Owera and Oduor Ochar.
59. For the foregoing reasons and findings, I find that the plaintiff was partly successful in his claim and because costs follow the event, each party shall bear their respective costs of the suit. The upshot is that this court issues the following disposal orders;
- a. The plaintiff's claim for adverse possession is hereby dismissed.
  - b. The transfer of land parcel number East Ugenya/Kathieno "B"/455 from the names of Nyawara Owera and Oduor Ochar to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, is hereby cancelled.
  - c. Land parcel numbers East Ugenya/Kathieno "B"/1608, 1609 and 1610 which were subdivisions of land parcel number East Ugenya/Kathieno "B"/455 and their subsequent transfers are hereby cancelled.
  - d. Land parcel number East Ugenya/Kathieno "B"/455 parcel is hereby restored in the name of the Nyawara Owera and Oduor Ochar.
  - e. Each party shall bear their respective costs of this suit.

It is so ordered

**DELIVERED AND DATED AT SIAYA THIS 13<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**13/10/2022**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Sambu for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

