



Odikor & 2 others (suing as principal officials of Kaliwa Amoit Women Group) v Omusugu & 2 others (Environment & Land Case 119 of 2014) [2022] KEELC 15100 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 119 OF 2014
AA OMOLLO, J
NOVEMBER 24, 2022**

BETWEEN

**SEBANCIA ODIKOR 1ST APPLICANT
PASCALIA AMACHULANG 2ND APPLICANT
JUSTIN AKHUDU 3RD APPLICANT
SUING AS PRINCIPAL OFFICIALS OF KALIWA AMOIT WOMEN GROUP**

AND

**SEBASTIAN OMUSE OMUSUGU 1ST RESPONDENT
DAVID OMUSE OMUSUGU 2ND RESPONDENT
JOSEPH OLOO OMAR 3RD RESPONDENT**

JUDGMENT

1. The Applicants commenced these proceedings vide the Originating Summons dated December 28, 2011 and filed in court on June 15, 2012 against the Respondents. They later amended their Originating Summons on February 12, 2018. The Applicants claim that they have acquired by way of adverse possession rights over LR NO SOUTH TESO/APOKOR/176, 2614, 2615 & 2616 or any other title derived therefrom as on the ground currently registered in the names of Sebastian Omuse Omusugu and David Omuse Omusugu respectively. The Applicants prayed for the following orders:
 - a. That the applicants be and are hereby declared to have acquired ownership and title to a portion of land measuring 0.2 hectares by virtue of adverse possession to be excised from parcels number SOUTH TESO/APOKOR/176, 2614, 2615 and 2616.



- b. That the applicants be and are hereby declared to be entitled to a portion of land measuring 0.2 hectares to be excised from land parcel numbers SOUTH TESO/APOKOR/176, 2614, 2615 and 2616 and as adjudged in BUSIA CM LD NO 31 of 2007.
 - c. That the Respondents be ordered to sign all necessary documents for consents for subdivision and transfer of 0.2 hectares from parcel numbers SOUTH TESO/APOKOR/176, 2614, 2615 and 2616 to the applicants and in default thereof the Deputy Registrar of the High Court to empowered to sign on the respondents' behalf.
 - d. In the alternative, the respondents do pay a sum of Kshs 200,000/= as compensation for the applicants' entitlement of 0.2 hectares of the suit land.
2. The Originating Summons was supported by an affidavit deposed to by Sebanicia Odikor which annexed a copy of the mutation form for LR SOUTH TESO/APOKOR/176, copies of proceedings and order in LDT case number and certificate of search. The Applicant deposed that
 3. The Respondents entered appearance and filed a Replying Affidavit deposed to by the 2nd Respondent on behalf of the 1st Respondent and himself. He deposed that the matter is res judicata as there is a matter that exists between the applicants and him in the lower court over the same subject matter being BUSIA CMCC NO 149 OF 2009 and denied that the applicants have been in peaceful, quiet and uninterrupted occupation of the suit parcels as alleged and hence do not qualify to acquire it by way of adverse possession. Annexed to the affidavit was a copy of a pleadings in CMCC NO 149 OF 2009.
 4. The matter proceeded for hearing on November 9, 2021 with Pascha Amachulang testifying as PW1. She said that she knows the 1st applicant who is the current chairman and the 3rd applicant was their secretary of their group. She adopted their affidavit evidence dated May 16, 2021 stating that they purchased a portion of land from the 1st Respondent in 1989 measuring 0.2 hectares at Kshs 3500/. That the land was demarcated for them with clear boundaries that are still intact. They built a grass thatched house thereon and used to cultivate the land until the year 2002 when they built a semi-permanent house and have continued to use the plot by renting out their house and running activities of their group. Pw1 continued to state that they obtained the consent of the Land Control Board and brought the surveyor to survey their land but the process of getting their title was not completed as the respondent was required to correct his names that read Sabastian Omuse Omusugu on the identity card and Omuse Omusungu.
 5. She avers that the 1st respondent became reluctant on applying for correction of his names thus delaying the transaction and she filed a claim on behalf of the group at the Tribunal which found that they be given 0.2 hectares out of LR SOUTH TESO/APOKOR/176. The award was adopted by court on September 18, 2007. She continued that to defeat the judgment pursuant to the award, the 1st Respondent subdivided his land into 3 portions and transferred one of them to his son and another one to a third party. According to Pw1, the part of land in which their portion is situated was given to the 2nd respondent.
 6. Pw1 posited that the respondents have never challenged the judgment obtained pursuant to the Tribunal award and by the time the 1st respondent opted to secretly subdivide his land so as to transfer their portions to be within his son's title, the 1st respondent title to 0.2 hectares of his land parcel no. SOUTH TESO/APOKOR/176 had been extinguished. She finished by saying that the respondents hold title to their portion of land in trust for Kaliwa Amoti Women Group because the group has held possession and used the subject plot physically and continuously since 1984 to date. She produced the documents in their list as PEX 1-3.



7. Under cross examination by Mr Ashioya learned counsel for the Respondents, Pw1 stated that the women group was registered in 1992 and they were claiming a portion of LR SOUTH TESO/APOKOR/176. She reiterated that the land had been sold and subdivided and they purchased a portion measuring 0.2 hectares which was allocated no. 1530. That their share was not included in the new sub-divisions by the 1st respondent. She stated she did not have a green card for LR NO 1530 or the new numbers or sub-divisions. She reiterated that they had a case before the tribunal with 1st respondent which awarded them the land.
8. The 2nd Applicant told the court that the 2nd respondent demolished their house in 2013 and sold the portion to someone else. They reported him to the chief but the chief did nothing because this case was pending. She further said that they are seeking alternative remedy of refund of Kshs 200,000/= that will enable them purchase an equivalent size of land but they do not have a valuation report for the suit portion. She admitted that the 2nd respondent sued them in case no 149 of 2009 in the CM's court over the same subject matter. On re-examination, Pw1 said that their estimate is premised on the price of one acre of land in their area is Kshs 400,000/= so ½ acre is Kshs 200,000/=.
9. The defence case was presented on March 24, 2022 with Sebastian Omuse Omusungu testifying as DW1. He adopted his witness statement filed in court on March 29, 2018 in which he stated inter alia that in the year 1989 he leased a half of land on LR SOUTH TESO/APOKOR/176 to Amoti Women Group (Applicant) for a period of 3 years at a monthly rent of Kshs 1000/= totalling Kshs 36,000/=. He stated that the Applicant only paid for three months, Kshs 3000/= but they continued using his land without payment from 1989-1992. Upon the expiry of the said period, he decided to distribute his land to his sons. Dw1 denied that Applicant has ever paid for any land and denied entering into any sale agreement with the Applicant group. He produced the documents in his list dated August 21, 2013 as DEX 1-5.
10. During cross examination, he stated that because of his age he could not remember the parcel number and at one point, his name in the register was Omuse Omusungu. Dw1 agreed that he made an application for correction of name to read Sebastian Omuse Omusungu. That their three-year lease with the Applicant was not reduced into writing. He also could not remember the date of commencement of the lease. The witness admitted that the plaintiffs built a grass thatched house but denied that later they built an iron roofed house. He further denied appearing before the Amukura Land Disputes Tribunal. He reiterated that he leased to the plaintiffs half acre and admitted that it is true he delayed in correcting his name in lands office to correspond the one in the ID. He was aware the Land Disputes Tribunal directed that he gives the plaintiffs ½ acre.
11. The second defence witness was David Ouma Omuse who testified as DW2 and adopted his contents of his replying affidavit dated March 6, 2018 and already summarised herein above.
12. While under cross examination by Mr Wanyama counsel for the applicants, Dw2 stated that the land registered in his father's name is South Teso/Apokor/176. It was subdivided into LR 2614 in the name of the 1st respondent, LR 2615 in the 3rd respondent's name. According to him, the 3rd respondent bought the land from the 1st respondent in 1991. In regard to his case in SPMCC 149 OF 2009 Dw2 asserted that the case was already decided although decree has not been produced. He told the court that the plaintiffs came to this land in 1987 under lease which agreement was oral. Dw2 participated in the proceedings before the Tribunal and heard the Applicant state that they purchased the land but the agreement was lost.
13. The 2nd Respondent denied that they changed their mind after learning that the Applicant's agreement was lost. He confirmed that the Land Disputes Tribunal awarded the plaintiffs ½ acre but they did not



give them the ½ acre. He also admitted that they did the sub-division ignoring the award of the Land Disputes Tribunal although they did not file any appeal against the award. He told the court that the plaintiffs were using ½ acres and the whole land area for LR 176 was 6 acres. The portion the plaintiffs used is now under parcel no LR 2615 which he got from his father as a gift.

14. The parties agreed to exchange written submissions. The 1st and 2nd Respondents filed their submissions on May 17, 2022 and submitted that the applicants failed to meet the threshold for proving a claim for adverse possession. They submitted that the applicants obtained their registration in 1992 and any claim by it as a legal entity would start running from that year. They further submitted that the group's occupation was interrupted and the new owner has been using the land for the past 9 years to their exclusion.
15. The Respondents contend that the suit is sub-judice as the disputes began at the Land Disputes Tribunal and continued to the PM's Court in Busia. They finished off by saying that the claimant has not laid any evidence that would bring out the certainty of their position on the ground. They relied on the decision of Judge *RCN KULOBA (retired)* in [GABRIEL MBUI V MUKINDIA MARANYA \(1993\) eKLR](#), who stated as follows when faced with the issue of adverse possession;

' As stated by Gicheru, JA, in Kweyu's case, op cit, in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.

I have searched for facts to show all these things, but none have been found, except the admitted mere possession. There is no evidence on the intent. There is no evidence on colour of right. What I have found in this case is a possessor without proved adverse possession, and possession which is not necessarily exclusive with the requisite intent. I cannot manufacture evidence or assume legal consequences in favour of the plaintiff when I have no factual data supportive thereof.

When all these things are carefully considered in the manner of my foregoing endeavour, with a view to do justice to the parties in this particular case without violating the law and the tenets of equity in so far as the circumstances and inhabitants of Kenya permit, and subject to the qualifications to the common law doctrine as those circumstances render necessary, the singular conclusion in the instant case is that the plea of, and the claim of title based upon, the doctrine of adverse possession must fail. It has not been supported by facts.

The inescapable result is that this suit is dismissed. The plaintiff shall pay the costs of this suit. I so decide, and I so order. Orders shall be made accordingly.'

16. The applicants filed their submissions on July 12, 2022 which constituted an analysis of the evidence adduced by both parties. They urged the court to grant the prayers in the originating summons as they had physically, peacefully and continuously possessed and occupied the purchased portion of 0.2 hectares that was properly demarcated for them by the seller in the year of their entry being the year 1989.



17. After consideration of the parties' pleadings, evidence adduced and the submissions made before court, I frame the following issues come up for determination;
- a. Whether the applicants have proved their claim of adverse possession;
 - b. Whether the suit is sub-judice;
 - c. Who should bear the costs of this suit?
18. There is no dispute that the applicants entered into and occupied a portion of the suit land measuring 0.2ha in the year 1989. What is in dispute is whether the entry was pursuant to a sale agreement or lease with the 1st Respondent. It is the Applicant's case that they purchased the land and the purchase price was paid in full. Pw1 averred the sale agreement was not produced because it was lost. The Applicant produced a mutation form dated January 1990 where the 1st Respondent agreed to subdivide LR SOUTH TESO/APOKOR/176 to create LR SOUTH TESO/APOKOR/1529 and LR SOUTH TESO/APOKOR/1530 with the latter number being for the applicant. DW1 on his part told the court that he entered into a verbal 3-year lease agreement with the applicant and they only paid three months' rent for the entire lease duration. According to the 1st Respondent, after the expiration of the lease period, he decided to distribute the land to his sons.
19. From the evidence adduced by both parties, it is clear that the applicants came to be on the suit land through some agreement, whether sale or lease. If the court proceeds on the premise that the entry was through a lease, the 1st Respondent did not adduce evidence that he recovered possession after the expiry of the lease. The non-recovery of possession is confirmed by the position taken by the 2nd Respondent when he filed a suit in the year 2009 seeking eviction of the Applicant from the suit portion of the land. At paragraph 3 of the amended plaint in Busia PMCC Case no 149 of 2009, it is pleaded thus;
- 'The plaintiff is the registered owner of LR South Teso/Apokor/2615 and seeks for orders of injunction and eviction against the Defendants who are using his land without regard to the plaintiff's right and interest.'
20. The continued stay of the Applicant on the land according to the 1st Respondent was without his permission as it informed his decision to share the land amongst his sons. The 1st and 2nd Respondents have not told this court what action they took other than the filing of the case in the year 2009 that made the Applicant's stay on the suit portion not to be peaceful. The filing of the case in the year 2009 stopped time from running in favour of the Applicant. However, this court was not made aware through documents on the status of that case whether it has been concluded or not. Secondly, the Respondents did not apply to have this suit stayed pending the hearing and determination of their suit. To the extent that no stay orders were issued and to the extent that the law allows a defence of adverse possession to be raised in claim, there was nothing wrong in the Applicant moving this court to claim his rights under adverse despite the pendency of the former suit.
21. Again, if the court proceeded on the premise that the Applicant was a purchaser for value over the disputed 0.2ha, time stated running from the date when the period to obtain consent of the Land Control Board was to be obtained and or upon the expiry of the contract period. Whichever event is used to compute time from 1989 until in 2009 when the suit to recovery land was filed, twelve (12) years had lapsed in favour of the Applicant.



22. On whether one can raise a claim under the doctrine of adverse possession land they have purchased, the Court of Appeal in Wambugu -vs- Njuguna (1983) KLR 173 expressed themselves as follows;

' Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment'.

23. In line with the principle in the *Wambugu vs Njuguna* (supra), PW1 told the court that they paid the purchase price of Kshs 3500/= in 1989 and they took over possession of the 0.2 Ha where they stayed until 2013 when their house was demolished. Before the demolition and or interference happened, the applicants had been in open, notorious occupation and possession of the suit land for a period of over 12 years. The interruption also took place during the pendency of this suit which was in contradiction with the doctrine of *lis pendens*.

24. Further, the Applicant produced an order of court in PMCC Land Dispute no 31 of 2007 where the court adopted the finding of the Teso Land Disputes Tribunal. The applicants had approached the Teso Land Disputes Tribunal claiming that they had purchased 0.2 HA from LR SOUTH TESO/APOKOR/176 and their claim was upheld. Although the 1st Respondent told the court that he did not appear before the Teso Land Disputes Tribunal, from the proceedings of the Tribunal, he is recorded to have testified before the Tribunal. But more importantly, he admits knowing that Tribunal had directed that the applicants be awarded ½ acre. DW2 also admitted that he participated in the Disputes Tribunal and despite knowing of the award given to the Applicant, they proceeded to subdivide LR S.Teso/Apokor/176 without obeying the decree in place.

25. In light of the evidence adduced, it is clear the size of land the applicants are claiming. The Applicant was also specific that after the subsequent subdivision, their portion fell under the title number S.Teso/Apokor/2614 & 2615 now registered in the name of the 2nd and 3rd Respondents. The claim cannot be defeated merely on account of subdivision and or change of name when such change was executed with the sole intention of defeating the Applicant's claim. Secondly, there was an order directing the 1st Respondent to give out the 0.2ha to the Applicant which he did not comply with. Whether or not the order was given by a court of competent jurisdiction, as long as the order had not been varied or set aside, they had an obligation to comply with it.

26. The Court of Appeal in James Karuri Ndegwa & Another v Ndegwa Mbiti & Another [2008] eKLR, the Court stated as follows:-

' A court order remains a valid court order until and unless it is set aside on appeal and or reviewed. As long as the court order has not been challenged, overturned, set aside and or reviewed, it remains a valid court order which has to be obeyed and or enforced. By whichever means it was obtained, until a competent court is moved to vary or set aside the said order, the same remains in force and binding to all parties.'

27. In totality of the analysis provided, I am satisfied that the Applicant has made a case of establishing her claim against the Respondents jointly and severally that they are entitled to a portion of land measuring 0.2ha originally comprised in LR S Teso/Apokor/176 which after subdivision was numbered S Teso/Apokor/2614 & 2615. Therefore, I enter judgement for the Applicant in the following terms;



- a. That the applicants be and are hereby declared to have acquired ownership and title to a portion of land measuring 0.2 hectares by virtue of adverse possession to be excised from parcels number SOUTH TESO/APOKOR/176, 2614, 2615 and 2616.
- b. The respondents shall jointly and severally pay a sum of Kshs 200,000/= as compensatory value of the applicants' entitlement of 0.2 hectares of the suit land within 60 days of this judgement.
- c. In default of complying with (b), the Applicant is at liberty to execute.
- d. The costs of the suit awarded to the Applicant

Dated, signed & delivered online at Milimani this 24th Day of November, 2022.**

A. OMOLLO

JUDGE

Sent to advocates on record via email at BUSIA this 24th Day of November, 2022

DEPUTY REGISTRAR, ELC

BUSIA

