



REPUBLIC OF KENYA



**Abwoga v Sidandi & 2 others (Environment & Land Case 170 of 2016)
[2022] KEELC 15269 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 170 OF 2016**

BN OLAO, J

DECEMBER 8, 2022

BETWEEN

NIMROD ZOWED ABWOGA PLAINTIFF

AND

HUMPRES WANDERA SIDANDI 1ST DEFENDANT

JOSEPHAT PAMBA WANDERA 2ND DEFENDANT

LEONARD BWIRE WANDERA 3RD DEFENDANT

JUDGMENT

1. Namrod Zowed Abwoga (the Plaintiff and acting in person) moved to this Court vide his Originating Summons dated 1st December 2016 and filed on 2nd December 2016 seeking judgment against Humpres Wandera Sidandi, Josephat Pamba Wandera And Leonard Bwire Wandera (the 1st, 2nd and 3rd defendants respectively) in respect to the land parcel No. Samia/luanda/mudoma/3878 (the suit land) in the following terms:
 1. That the Plaintiff be declared the owner of one acre piece of the land parcel in land reference number Samia/luanda/mudoma /85 vis a viz (sic) Samia/luanda/mudoma/3878 measuring one acre which he occupies and to which he is entitled by virtue of adverse possession and the defendants be ordered to transfer title to the suit land to the Plaintiff.
 2. That in default of the defendants transferring the said title voluntarily, the Court do make an order authorizing the Deputy Registrar High Court of Kenya to execute all the documents necessary to effect the transfer of land parcel number Samia/luanda/mudoma/85 vis-a viz (sic) Samia/mudoma/3878 to the above named Plaintiff.



3. That the Honourable Court do make orders restraining the defendants from interfering in any way with a portion of one acre due to the Plaintiff comprised in land parcel number Samia/luanda/mudoma/85 vis-a viz (sic) Samia/luanda/mudoma/3878.
4. That the defendants be compelled to pay the costs of this summons to the Plaintiff
5. That the Honourable Court do make further orders to grant any other relief deemed it and just.

The Originating Summons was premised on the grounds set out therein and supported by the Plaintiff's affidavit also dated 1st December 2016. The Plaintiff also filed his statement dated 1st December 2016 and the following documents:

1. Plaintiff's identity card.
2. Certificate of Official Search in respect to the land parcel No Samia/luanda/mudoma/3878
3. Land sale agreement dated 20th August 1984 between the Plaintiff and the 1st defendant.
4. Un-dated letter by the 3rd defendant.
5. Letter by the Plaintiff addressed to the Deputy County Commissioner Samia Sub-county in reference to land parcel No. Samia/luanda/mudoma/85.

And although the said list purports to include a letter from the Deputy County Commissioner Samia Sub-county, no such letter was filed.

2. The basis of the Plaintiff's claim as can be gleaned from both his supporting affidavit and statement is that he is entitled to a portion of land measuring one acre out of the suit land which he purchased from the 1st defendant vide a sale agreement dated August 20, 1984 and which is currently registered in the names of the 2nd and 3rd defendants. That he has been in actual possession and use of the said one acre to-date which is a period of over 12 years. That the suit land is a resultant sub-division from the land parcel No Samia/luanda/mudoma/85 which was originally registered in the name of the 1st defendant and that he fully paid the purchase price before the 1st defendant moved out and gave him vacant possession. However, the 1st defendant has not yet given him the title to the said one acre whose boundaries have been fully demarcated. That on December 9, 2015, he had a meeting with the defendants to discuss the transfer of the one acre to him. He was asked to pay Ksh.20,000 to the 1st defendant being the survey and registration fees which he did. However, the defendants colluded and sub-divided the said land to create the suit land which is now registered in the names of the 2nd and 3rd defendants. It is his case that the registration of the suit land in the names of the 2nd and 3rd defendants was done fraudulently with the aim of defeating his interest therein. That he has occupied the one acre peacefully and uninterrupted and the 2nd and 3rd defendants therefore hold it in trust for him yet they have threatened to bar him and his family from using it and intend to sell it to third parties.
3. Leonard Bwire Wandera the 3rd defendant swore a replying affidavit dated June 26, 2019 on behalf of the other defendants in opposition to the Originating Summons. He stated that he and the 2nd defendant are sons to the 1st defendant who was at all times the registered proprietor of the land parcel No Samia Luanda/mudoma/85. That in 2015 or thereabout, the 1st defendant sub-divided the said land to create land parcels No Samia/luanda/mudoma/3878, 3879, 3880, 3881, 3882, and 3883. That the suit land was thereafter registered in his name and that of the 2nd defendant and remains so to-date. That he and the 2nd defendant have embarked on the process of sub-dividing the suit land to create land



parcels No Samia/luanda/mudoma/4028 and 4029. That the Plaintiff is a stranger who has unlawfully and arbitrarily encroached onto the suit land where he has proceeded to construct his house but the defendants have served him with a demand letter to vacate. That it is not true that the Plaintiff has been living on the suit land except that in 2016 he was served with a demand letter when he unlawfully encroached thereon. That the sale agreement is a forgery and in any case, it is void ab initio for want of the consent of the Land Control Board.

4. The defendants annexed the following documents to the replying affidavit:
 1. Mutation Form for land parcel Samia/luanda/mudoma/85 creating parcels Samia/luanda/mudoma/3878, 3879, 3880, 3881, 3882 and 3883.
 2. Mutation Form for land parcel Samia/luanda/mudoma/3878 creating parcels No. Samia/luanda/mudoma/4028 and 4029.
 3. Application to sub-divide the land parcel No. Samia/luanda/mudoma/3878.
 4. Vacation Notice dated 29th November 2016 addressed to the Plaintiff.
 5. Title deed to the land parcel No Samia/luanda/mudoma/3878 registered in the names of the 2nd and 3rd defendants on 11th January 2016.
5. The plenary hearing was held on 16th November 2022 and the Plaintiff was the only witness in support of his case while the 3rd defendant testified on behalf of the defendants. They all adopted as their evidence their respective affidavits and statement whose contents I have already summarized above. They also produced the various documents annexed to their respective pleadings as listed above.
6. Both parties are acting in person and as is to be expected, their pleadings are not what you can describe as the epitome of elegance. For example, the Plaintiff describes the subject matter of this dispute in paragraph 2 of his originating summons as follows:

“ That the Applicant/Plaintiff be declared the owner of one acre piece of land number in land reference number Samia/luanda/mudoma/85 vis-a-viz (sic) Samia/luanda Mudoma/3878 measuring 1 acre which he occupies and to which he is entitled by virtue of adverse possession and the defendants/Respondents be ordered to transfer title to the suit land to the Plaintiff/Applicant.”
7. It is also clear that a mutation has been drawn to sub-divide the suit land to create two parcels of land being Samia/luanda/mudoma/4028 and 4029 but the said mutation form is not only incomplete but is also not signed by a surveyor.
8. This Court must however do the best it can in the circumstances and serve justice to the parties.
9. The Plaintiff's claim is that he is entitled to a portion of land measuring one acre out of the suit land by way of adverse possession having purchased it from the defendant vide an agreement dated August 20, 1984 and taken possession and occupation thereof. He and his family live there to-date.
10. The defendants' rejoinder in opposing that claim is that the sale agreement is a forgery meant to defeat the interests of the 2nd and 3rd defendants who are the registered proprietors of the suit land. And that in any event, the said land sale agreement is null and void ab-initio since no consent of the Land Control Board was obtained.
11. It is not in dispute that the suit land is registered in the names of the 2nd and 3rd defendants who hold a title deed issued in their joint names on January 11, 2016. And although the defendants have produced



a mutation form dated December 7, 2016 suggesting that the suit land has been sub-divided to create land parcels No. Samia/luanda/mudoma/4028 and 4029, that form is incomplete and is not signed by the surveyor as required. This Court can therefore only conclude that the attempt to sub-divide the suit land to create land parcels No. Samia /luanda/mudoma/4028 and 4029 was only an exercise that remains still-born.

12. As the plaintiff's claim is one of adverse possession, it is governed by section 38 (1) of the *Limitations of Actions Act* which provides:

“When a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, 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 the proprietor of the land.”

13. It is now well established that the combined effort of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Action Act* is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years – *Benjamin Kamau & Others v. Gladys Njeri C.a* Civil Appeal No2136 of 1996. section 7 of the same Act 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 other person through whom he claims, to that person.”

14. The new land laws promulgated following the 2010 Constitution also recognize the doctrine of adverse possession. Section 28 (h) of the new *Land Registration Act* 2012 identifies as among some of the overriding interests in land:

“rights acquired on in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.”

Similarly, Section 7 of the new *Land Act* 2012 provides that:

“Title to land may be acquired through:-

- a)
- b)
- c)
- d) prescription.”

15. In *Titus Kasuve v Mwaani Investment Ltd & another* 2004 1 KLR 184, the Court of Appeal stated as follows with regard to what a party claiming land by way of adverse possession must prove:

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje vs. Saikwa* (No 2) 1984 KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse



possession does not interrupt such person's adverse possession – (see Githu V. Ndeete 1984 KLR 776)” Emphasis mine.

In *Kweyu v. Omuto* 1990 KLR 709, the Court of Appeal stated that:

“By adverse possession is meant a possession which is hostile vide a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous, when such possession is continued for the requisite period (12 years) it confers an indefeasible title upon the possessor”. Emphasis mine.

That possession must also be *nec vi, nec claim, nec precario* i.e without force, without secrecy/stealth and without the permission of the owner – *Kimani Ruchine & Another v. Swift Rutherford & Company Ltd* 1980 KLR 10 [1976 – 80 KLR 1500].

15. In *Robert Shume & others v. Samson Kazungu Kalama* 2015 eKLR, the Court of Appeal added that:

“By dint of section 7 of the *Limitation of Actions Act*, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent's title for a period of twelve (12) and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was *nec vi, nec claim nec precario*, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without permission of the owner.” Emphasis mine.

16. Finally, in a recent exposition of the doctrine of adverse possession, the Court of Appeal said the following in the case of *Mtana Lewa v. Kabindi Ngala Mwangandi* C.a Civil Appeal No56 of 2014 [2015 eKLR]:

“Adverse possession is essentially a situation where a person takes possession of land and assets rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre-requisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*” Emphasis mine.

It is clear from the above that a claim for land by adverse possession can only be mounted against the proprietor of the land being claimed or, if he is deceased, his legal representative. In the circumstances of this case, the 1st defendant is no longer the registered proprietor of the suit land. Indeed he has never been. Instead, he was the proprietor of the original land parcel No. Samia/luanda/mudoma/85 which title was closed on January 11, 2016 when the suit land was created and registered in the names of the 2nd and 3rd defendants some 12 months before this suit was filed on December 3, 2016.

17. It follows therefore that the suit as against the 1st defendant is for dismissal.

18. The Plaintiff's occupation and possession of the portion of one acre out of the suit land which he claims is not really in dispute. The only point of divergence is that while the plaintiff has averred in paragraph 4 of his supporting affidavit and paragraph 3 of his statement that he went into occupation



in 1984 having paid the full purchasers price to the 1st defendant who then moved out, the 2nd and 3rd defendants have averred in paragraph 14 of the 2nd defendant's replying affidavit that the plaintiff has never lived on the suit land but also that they served him with a notice to vacate in 2016 after he had unlawfully encroached thereon. During cross-examination, however, the 2nd defendant said:

“I first saw you on the land in 1995. Before that, I was a student in school. It is true that I have never filed a case against you with respect to the land parcel No Samia/luanda/mudoma/3878. You live on that land with your family.”

If, as he admits, the 3rd defendant, who testified on behalf of the other defendants, first saw the Plaintiff on the suit land in 1995 where he now lives with his family, it cannot be correct for the defendants to claim that the Plaintiff encroached onto the suit land in 2016. This Court will accept the Plaintiff's testimony that indeed he went into occupation and took possession of the suit land in 1984 following the land sale agreement between him and the 1st defendant who is the father of the 2nd and 3rd defendants, after paying the full purchase price.

19. Further, in his own evidence in chief, the 3rd defendant said:

“I did sub-division after succession. The Plaintiff is still living on the land to-date. He constructed a home thereon where he lives with his family”

As is clear from paragraphs 4 and 5 of the Plaintiff's supporting affidavit, he took possession of the one acre soon after paying the full purchase price in 1984. The defendants have therefore been disposed of that portion of land which is an important ingredient of a claim founded on adverse possession. In *Sisto Wambugu v. Kamau Njuguna* C.a Civil Appeal No 10 of 1982 [1983 eKLR], ChesoniAg J.A (as he then was) cited with approval the words of Lindley Mr In Littedale V. Liverpool College 1900 1CH19 where he said:

“In order to acquire by the Statue of Limitations a title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.....”

Having taken possession and occupied one acre out of the suit land in 1984 following the land sale agreement with the 1st defendant, it follows that by the time the Plaintiff filed this suit in 2016, he had been in occupation of the portion measuring one acre for 32 years well above the statutory period of 12 years. That occupation was peaceful, open, notorious and un-interrupted. In paragraph 18 of his replying affidavit, the 3rd defendant makes reference to “a number of meetings with the Applicant at the Administrative Office (where) the Applicant failed to establish a clear claim on the suit land.” No evidence was placed before this Court to show whether infact such meetings took place, when and what was discussed. The defendants have never filed any suit seeking to assert their ownership of the one acre which the Plaintiff has occupied since 1984. When he was cross-examined by the Plaintiff, the 3rd defendant said:

“It is true that I have never filed a case against you with respect to the land parcel No Samia/luanda/mudoma/3878. You live on that land with your family”

In essence, therefore, the Plaintiff's occupation and possession of the said one acre has never been interrupted.

20. It is clear from the sale agreement dated August 20, 1984 that when the Plaintiff purchased the one acre from the 1st defendant, the land was Samia/luanda/mudoma/85. It has since mutated to create



other parcels including the suit land in 2016 and which is now registered in the names of the 2nd and 3rd defendants. However, the law is that mere change of ownership of land claimed by a person in possession does not defeat that person's claim in adverse possession. And further, adverse possession can be claimed for only a portion of the land in dispute – *Githu v. Ndeete* 1984 KLR 776.

21. In opposing the Plaintiff's claim, the 3rd defendant has averred as follows in paragraph 17 of his replying affidavit:

“That even if we were to assume that the alleged sale agreement is true, the purported land sale agreement is void ab initio since the land in question is agricultural land and no any consent of the Land Control Board was obtained.”

The Plaintiff is not seeking to enforce the sale agreement dated 20th August 1984. He is seeking to be registered as the proprietor of one acre out of the suit land by way of adverse possession having occupied the same since 1984 when he purchased it from the 1st defendant and went into occupation after paying the full purchase price. As Madan J.A (as he then was) stated in *Public Trustee V. Wanduru Ndegwa* 1984 eKLR [C.a Civil Appeal No. 73 Of 1982], a purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

The same judge went on to say the following with respect to the application of the Land Control Board's consent in a claim to land by adverse possession:

“The provisions of the *Land Control Act* have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, transaction or a dealing in agricultural land.”

Similarly, in *Peter Mbiru Michuki V. Samwel Mugo Michuki* C.a Civil Appeal No22 of 2013 [2014 eKLR], the Court of Appeal said:

“On our part, we are of the view that there are four alternative timelines that could be used to compute when time begun to run for purposes of the Plaintiff's claim for adverse possession. These are 1964, 1970, 1971 and 1978. The year 1964 is the year of the sale agreement between the parties and in this year, the Plaintiff took possession of the suit property.”

The same Court stated in *Mwangi & Another V Mwangi* 1986 KLR 328 that the rights of a person in possession and occupation of land are equitable rights which are binding on the land which is subject to those rights.

22. The defendants have produced as part of their documentary evidence a vacation notice dated November 29, 2016 and addressed to the Plaintiff directing him to vacate the suit land within 14 days failure to which he would be evicted. That letter came rather late because by November 29, 2016, the defendants' interest in the portion of the suit land occupied by the Plaintiff had long been extinguished. In any event, such notice was not sufficient. The defendants ought to have filed a suit against the Plaintiff to assert his right. In *Meggary & Wade, the Law Of Real Property* 6th Edition, it is stated at page 1309 that:

“Once factual possession has been established, it will not be terminated merely because the owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates or acknowledges the true owner's title”



Similarly, in *Githu v. Ndeete* (supra) Potter J.A. stated that:

“Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or takes an effective entry into the land; see Cheshire’s *Modern Law Of Real Property* 11th Edition at page 894. In my view, the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”

The notice to vacate dated November 29, 2016 was not therefore of any useful purpose and did not interrupt the Plaintiff’s claim in adverse possession. In any case, by 2016, the Plaintiff’s right in the one acre out of the suit land had long crystalized.

23. There is also evidence pointing to the fact that in an attempt to defeat the Plaintiff’s claim, the 2nd and 3rd defendants later tried to further sub-divide the suit land while this suit was pending. In paragraph 14 of his supporting affidavit and paragraph 13 of his statement, the Plaintiff has averred as follows:

“That I have discovered that the defendants have in collusion fraudulently sub-divided and transferred my portion in the names of the 2nd and 3rd defendants in land reference number Samia/luanda/mudoma/3878 with an aim of defeating my purchaser’s interest in the said land.”

Fortunately for the Plaintiff, the fraud, as I have already stated earlier in this judgement, is very easy to see through. In their haste to extract the fraudulent sub-division of the suit land to defeat the Plaintiff’s claim, the defendants overlooked the fact that the mutation form and the necessary diagrams were required to be signed by the surveyor. That was not done. It is also instructive to note that the mutation form and application for consent to sub-divide the suit land into 2 portions being Samia/luanda/mudoma/4028 and 4029 was dated December 7, 2016 only five days after this suit was filed. And although the 2nd and 3rd defendants assert that the suit land has since been further sub-divided to give rise to the above two parcels No Samia/luanda/mudoma/4028 and 4029, there is no evidence to suggest that the process was completed. Indeed in paragraph 10 of the 3rd defendant’s replying affidavit, he depones as follows:

“That since the new title was registered in the names of the 2nd (sic) and myself, we agreed with each other to further sub-divide this piece of land between the two of us and hence embarked on the process of sub-divisions as required by law that gave rise to new land parcel numbers 4028 and 4029” Emphasis mine.

In the absence of title documents or Certificates of Search to prove that the purported sub-division of the suit land was successfully completed and the resultant sub-divisions registered as alleged, this Court can only conclude that the said sub-division of the suit land to create land parcels No. Samia/luanda/mudoma/4028 and 4029 was still born and that the suit land still remains registered in the names of the 2nd and 3rd defendants as it was on 11th January 2016. And if the said sub-division was indeed successfully completed, that would still not defeat the Plaintiff’s claim because, as admitted by the 3rd defendant in paragraph 10 of his replying affidavit, the suit land was to be sub-divided “between the two” of them. Indeed it is their names which appear in the in-complete mutation form and application for consent to sub-divide the suit land. Therefore, this rules out any possibility that the purported sub-divisions, if any, have been registered in the names of a third party (ies) which would obviously have defeated the Plaintiff’s claim as such third party (ies) is (are) not party in these proceedings. Fortunately again for the Plaintiff, that is not the position in this case.



24. Having considered all the evidence in this case, I am satisfied that the Plaintiff has proved that he is entitled to be registered as the proprietor of a portion measuring one acre out of the suit land by way of adverse possession as prayed. However, since the suit land is only registered in the names of the 2nd and 3rd defendants, the claim as against the 1st defendant must be dismissed.
25. With regard to costs, the 1st defendant transferred the suit land to the 2nd and 3rd defendants knowing very well that he had already sold, as far back as 1984, a portion thereof measuring one acre to the plaintiff, he is not entitled to costs. As provided under section 27 of the Civil Procedure Act, his mischief is a “good reason” to justify denying him costs.
26. This court therefore makes the following disposal orders:
1. The claim against the 1st defendant is dismissed with no orders as to costs.
 2. Judgment is entered for the Plaintiff against the 2nd and 3rd defendants jointly and severally in the following terms:
 - a. The Plaintiff has acquired by way of adverse possession a portion of land measuring one (1) acre out of the land parcel No Samia/luanda/mudoma 3878 or any other subsequent subdivisions being Samia/luanda/mudoma 4028 and 4029 registered in the names of the 2nd and 3rd defendants.
 - b. The 2nd and 3rd defendants shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed for the land parcel No Samia/luanda/mudoma 3878 or any other subsequent title being Samia/luanda/mudoma/4028 and 4029 registered in the 2nd and 3rd defendants names for purposes of cancellation.
 - c. The County Surveyor Busia shall thereafter demarcate a portion measuring one (1) acre out of the land parcel No Samia/luanda/mudoma/3878 or Samia Luanda/mudoma/4028 and 4029 (as the case may be) to be registered in the name of the Plaintiff.
 - d. That portion of land measuring one (1) acre should, as much as possible, include the portion currently occupied by the Plaintiff and his family.
 - e. In default of (b) above, the Land Registrar Busia shall be at liberty to cancel the title to the land parcel No Samia/luanda/mudoma/3878 or, as the case may be, title to the land parcels No Samia/luanda/mudoma/4028 and 4029, from the register to facilitate (a) above.
 - f. The defendants, their agents, servants or any persons acting through them shall thereafter be permanently restrained from interfering with the plaintiff’s use, occupation and possession of the portion measuring one (1) acre to be curved out of the land parcels No. Samaia/luanda/mudoma/3878 or Samia/luanda/mudoma 4028 and 4029 to be registered in the plaintiff’s names.
 - g. The Plaintiff shall meet the costs of the survey, registration and other incidentals.
 - h. The 2nd and 3rd defendants shall meet the Plaintiff’s costs.

BOAZ N. OLAO

JUDGE

8TH DECEMBER 2022



**JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT ELC BUSIA ON THIS
8TH DAY OF DECEMBER 2022.**

In the presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

BOAZ N. OLAO

JUDGE

8TH DECEMBER 2022

