



Andai & another v Sawanga (Sued as the administrator of the Estate of David Sawanga Shinguti - Deceased) & another (Environmental and Land Originating Summons 102 of 2019) [2025] KEELC 5238 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5238 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 102 OF 2019
DO OHUNGO, J
JULY 14, 2025

BETWEEN

JOTHAM ANDANJE ANDAI 1ST PLAINTIFF

DANIEL MASABA KURUCHI 2ND PLAINTIFF

AND

PETER LIKALE SAWANGA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF DAVID SAWANGA SHINGUTI - DECEASED) 1ST DEFENDANT

MOSES SHIKHALO SAWANGA 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs moved the court through Originating Summons (OS) dated 28th August 2019 and filed on 30th August 2019. They averred in the OS that they had acquired title to a 2.5 acres portion of the parcel of land known as Butsotso/Ingotse/3XX7 by adverse possession having purchased, occupied and used the said portion exclusively, peacefully, openly and uninterruptedly from 26th July 2004 to the date of the OS. They therefore sought the following orders:
 - a. That the applicants be declared the owners of 2.5 acres out of land parcel No. Butsotso/Ingotse/3XX7 which is a sub-division of L.R. Butsotso/Ingotse/7X0 having purchased the same in 2004 from the 2nd respondent whereafter they have lived on, occupied and used the said portion of land from 2004 to-date and the applicants are hence entitled to the said portion of land by virtue of adverse possession and the 2nd respondent be ordered to transfer title to the said portion of land to the applicants.
 - b. That the court issues a declaration that the 2nd respondent is holding title to the portion of land measuring 2.5 acres out of the parcel of land now designated as Butsotso/Ingotse/3XX7, (which was created from L. R. No. Butsotso/Ingotse/7X0) in trust for the applicants and



the 2nd respondent be ordered to transfer title to the said portion of land to the applicants and in default of the 2nd respondent transferring the same voluntarily the court do make an order directing or authorising the Deputy Registrar of this court to execute all the documents necessary to effect the sub-division of land parcel No. Butso/Ingotse/3XX7 and transfer of title to the aforesaid portion of land into the names of the applicants.

- c. The respondents be ordered to bear the costs of this originating summons.
 - d. The Honourable Court does make further orders or grant any other relief deemed just and expedient.
2. Hearing of the matter proceeded by way of oral evidence. Jotham Andanje Andai (PW1) testified that the Defendants were his neighbours and that he was in occupation of 0.5 acres of the suit property while the Second Plaintiff was in occupation of 2 acres as of the date of his testimony. He adopted his witness statement dated 1st September 2020.
 3. PW1 stated in his witness statement that he purchased a 2.5 acres portion of land parcel number Butso/Ingotse/7X0 from Moses Shikhalo Sawanga through an agreement dated 26th July 2004, at a consideration of KShs 140,000. That at the time of making the agreement, said parcel was registered in the name of David Sawanga Shinguti (deceased) who was the father to Moses Shikhalo Sawanga. That after the agreement, a survey was done and boundaries of the portion purchased marked by planting sisal along it and fencing it with a barbed wire fence.
 4. PW1 further stated that he took immediate vacant possession of the portion and started using it by planting trees and crops including maize, avocados, beans, bananas and sugarcane. That Moses Shikhalo Sawanga and Margaret Khasungu Sawanga who were the vendors undertook to conduct succession proceedings in respect of the estate of David Sawanga Shinguti to enable them to subdivide the land and transfer title to the portion to PW1 but unfortunately Margaret Khasungu Sawanga passed away. That as a result, Moses Shikhalo Sawanga solely conducted the succession proceedings through Kakamega HC Succession Cause No. 552 of 2009 but later abandoned the cause whereupon his brother Peter Likale Sawanga unlawfully and irregularly filed a second succession cause being Kakamega HC Succession Cause No. 20 of 2015.
 5. That later on, Andrew Owino Mangala purchased 1.5 acres from Moses Shikhalo Sawanga through an agreement dated 24th December 2012 and that both PW1 and Andrew Owino Mangala were included in Kakamega HC Succession Cause No. 552 of 2009 but not in Kakamega HC Succession Cause No. 20 of 2015. PW1 went on to state that he later sold 2 acres of the portion he had purchased to the Second Plaintiff through an agreement dated 17th March 2010 in which Moses Shikhalo Sawanga was a witness. That the 2 acres sold to the Second Plaintiff was surveyed in the presence of Moses Shikhalo Sawanga and boundaries demarcated. He added that he handed vacant possession to the Second Plaintiff who proceeded to construct a home, planted trees, sugarcane and other crops and had since peaceful, exclusive, open and uninterrupted possession, and use of the portion.
 6. PW1 further stated that Moses Shikhalo Sawanga never tried to evict the Plaintiffs or interfere with their exclusive possession and use of the land. That after the succession proceedings in Kakamega HC Succession Cause No. 20 of 2015, title number Butso/Ingotse/7X0 was closed and partitioned thereby creating new titles including Butso/Ingotse/3XX7 where the Plaintiffs' 2.5 acres and Andrew Owino Mangala's 1.5 acres are located. That the other title resulting from the partition was Butso/Ingotse/3XX6 which belonged to Peter Likale Sawanga before he sold it and migrated and that title number Butso/Ingotse/3XX7 was in the name of Moses Shikhalo Sawanga at the date of the statement.



7. PW1 produced copies of the documents listed as item numbers 1 to 7 in Plaintiffs' List of Documents dated 1st September 2020 (PExb. 1 to 7, respectively) and went on to testify that at the time he purchased the land, David Sawanga who was the registered proprietor had died and that he purchased from Moses Sawanga who was not the administrator of David Sawanga's estate at the time.
8. Daniel Masava Kuruchi, the Second Plaintiff, testified as PW2 and adopted his witness statement dated 1st September 2020. He stated in the statement that through an agreement dated 17th March 2010, he purchased a portion of land measuring 2.0 acres from the First Plaintiff at a consideration of KShs 340,000. That the portion was a portion of the 2.5 acres which the First Plaintiff had earlier purchased from Moses Shikhalo Sawanga. He added that Moses Shikhalo Sawanga was a witness to the agreement between him (PW2) and the First Plaintiff and that the portion was surveyed. That he was given vacant possession on 17th March 2010 whereupon he proceeded to construct a home thereon and planted trees and various crops. He further stated that the boundaries were clearly demarcated and that he enjoyed peaceful, exclusive, open and uninterrupted possession and use of the portion.
9. Andrew Owino Mangala (PW3) adopted his witness statement dated 1st September 2020 in which he stated that together with his brother Daniel Ochieng Mangala, they purchased a portion of land measuring 1.5 acres from Moses Shikhalo Sawanga, at a consideration of KShs 142,500, through an agreement dated 24th December 2009. He went on to testify that the Second Plaintiff was in occupation since the year 2010 while he (PW3) found the First Plaintiff in occupation in the year 2009.
10. The Plaintiffs' case was then closed.
11. Peter Likale Sawanga, the First Defendant, testified as DW1 and adopted his replying affidavit which he swore on 28th April 2023 and filed on 2nd May 2023. He deposed in the affidavit that parcel number Butso/Ingotse/7X0 was owned David Sawanya Sunguti alias David Sawanga Shinguti (deceased) who was his father and in respect of whose estate he filed Kakamega HC Succession Cause No. 20 of 2015 in which certificate of confirmation of grant was issued on 26th September 2015 pursuant to which the said parcel was distributed to DW1 and Moses Shikhalo Sawanga. That the parcel was thereafter subdivided into Butso/Ingotse/3XX6 which was first registered in DW1's names then sold and registered in the names of one Butichi Ramadhani Khamasi and Butso/Ingotse/3XX7 which was registered in the name of the Second Defendant. He added that during the purported purchase and entry into parcel number Butso/Ingotse/7X0 by the First Plaintiff, David Sawanya Sunguti alias David Sawanga Shinguti who then the proprietor was deceased and therefore any transaction on the said land was irregular, and unlawful and time for purposes of adverse possession could not start to run in favour of the Plaintiffs.
12. DW1 further deposed the First Plaintiff had not presented any evidence to show that the Second Defendant received the money allegedly agreed upon and paid as stated in the agreement dated 26th July 2004 and that prior to the alleged transactions, the First Plaintiff leased a portion of parcel number Butso/Ingotse/7X0 from the late Magret Khasungu Sawanga who was not a registered owner of the parcel. That the First Plaintiff never lived on any part of the suit parcels while the Second Plaintiff was living parcel number Butso/ Ingotse/3XX7 as of the date of the affidavit, due to an irregular transfer from the First Plaintiff. He added that it was not true that the Plaintiffs had lived on the parcels for more than 12 years or that they had enjoyed open, exclusive peaceful and uninterrupted occupation of parcel numbers Butso/Ingotse/3XX6 or Butso/Ingotse/3XX7 in view of the succession proceedings and the subdivision all of which involved assertion of rights over land, thereby stopping time for purposes of adverse possession from running.



13. DW1 produced copies of annexures PLS-001 to PLS-005 to the said affidavit as defence exhibits and further testified that the First Plaintiff did not reside on any part of parcel number Butso/Ingotse/7X0 as of the date of his (DW1's) testimony. That he had never resided on parcel number Butso/Ingotse/7X0 and that as of the date of his testimony, Ramadahn Butichi was in occupation of parcel number Butso/Ingotse/3XX6 while he (DW1) did not know who was in occupation of parcel number Butso/Ingotse/3XX7.
14. Moses Shikhalo Sawanga, the Second Defendant, testified as DW2 and adopted his replying affidavit which he swore on 28th April 2023 and filed on 2nd May 2023. He deposed in the affidavit that David Sawanya Sunguti alias David Sawanga Shinguti (deceased) was his father and that parcel number Butso/Ingotse/7X0 was distributed through certificate of confirmation of grant which was issued on 26th September 2015 in Kakamega HC Succession Cause No. 20 of 2015. That the agreement dated 26th July 2016 was fraudulently made in his name and in his absence since he had no capacity to transfer parcel number Butso/Ingotse/7X0 without succession. That he could not have signed the agreement since he was in police custody at the time it was made. Other statements in the affidavit were a replica of those in the affidavit of DW1.
15. DW2 produced copies of annexures MSS-001 to MSS-004 to his said affidavit as further defence exhibits and went on to testify that the First Plaintiff did not reside on parcel numbers Butso/Ingotse/3XX6 or Butso/Ingotse/3XX7. That instead, the Second Plaintiff was the one in occupation. He denied ever selling any portion of parcel number Butso/Ingotse/7X0 to the First Plaintiff and added that the Second Plaintiff had established a home on Butso/Ingotse/3XX7 and was using the parcel together with him (DW2).
16. The Defence case was then closed, after which directions for filing and exchange of written submissions were given. The Plaintiffs filed submissions dated 18th October 2024 while the Defendants filed submissions dated 14th February 2025.
17. I have considered the pleadings, the evidence and the submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought are available.
18. The law on adverse possession is found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of Richard Wefwafa Songoi v Ben Munyifwa Songoi [2020] eKLR where it held that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
19. The Plaintiffs trace their claim to the suit property to alleged sale transactions. It is important to restate that adverse possession is not about enforcement of or validity of sale agreements. A litigant who moves the Court on a claim for adverse possession ipso facto seeks to obtain title not by enforcing the sale agreement but through the doctrine of adverse possession. Consequently, the arguments advanced by the parties herein on validity of the transactions or sale agreements on account of want of letters of administration have no place in an adverse possession claim. As the Court of Appeal held in Richard Wefwafa Songoi v Ben Munyifwa Songoi (supra), at the foundation an adverse possession claim is



a wrongful dispossession of the rightful owner. There can be no wrongful dispossession if the parties remain in a contractual relationship through a sale agreement.

20. The foregoing notwithstanding, once a purchaser completes paying the purchase price, his possession and occupation of the property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
21. The First Plaintiff claimed that he is occupation of 0.5 acres and that he entered parcel number Butso/Ingotse/7X0 through a sale agreement dated 26th July 2004, between him and the Second Defendant. The Second Defendant has denied entering into the said agreement. In fact, the Second Defendant claims that the agreement was fraudulent and that he was in police custody as of 26th July 2004. I have perused the agreement. It states that the purchase price was KShs 140,000. Paragraph 6 of the agreement states: “THAT the purchaser shall pay the entire purchase price above whose receipt the seller jointly and severally acknowledge in full and final settlement on executing this agreement ”. The “shall” connotes a future payment obligation. The First Plaintiff has not produced any evidence of actual payment of the purchase price. It was crucial to produce such evidence in view of the Second Defendant’s denial of having entered into the said agreement. In the circumstances, time for purposes of adverse possession did not start to run in favour of the First Plaintiff in the absence of proof of payment of the purchase price.
22. Pursuant to clause 8 of the sale agreement dated 26th July 2004, the agreement was “subject to the due finalization of the succession” in respect of the estate of the estate of David Sawanga Shinguti who was the registered proprietor. According to the testimony of the Plaintiffs, the Second Defendant commenced succession proceedings in respect of the estate in the year 2009 through Kakamega HC Succession Cause No. 552 of 2009 but later abandoned the cause. The Plaintiffs also testified that later in the year 2015, the First Defendant filed a second succession cause being Kakamega HC Succession Cause No. 20 of 2015 which is the one that was finalised through confirmation of grant. Either way, in view of clause 8 of the sale agreement, the parties were in the contractual period awaiting filing of succession proceedings in terms of clause 8 until the year 2009 at the earliest. Time for adverse possession does not run as long as possession is contractual. This suit was filed on 30th August 2019. By then, only 10 years had passed from the time Kakamega HC Succession Cause No. 552 of 2009 was filed pursuant to clause 8 of the agreement, a far cry from the requisite 12 years of possession.
23. Regarding the Second Plaintiff, his own testimony was that he was given possession on 17th March 2010. By the time this suit was filed, he had been in possession for only 9 years, again short of the requisite period of 12 years.
24. I find that adverse possession has not been established. It follows therefore that the reliefs sought are not available. I find no merit in the Plaintiffs’ case and I dismiss it with costs to the Defendants.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 14TH DAY OF JULY 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Nanjala holding brief for Mr Akwala for the Plaintiffs

Mr Adeka holding brief for Ms Wilunda for the Defendants

Court Assistant: B Kerubo

