



**Akobo & 4 others v Samuel & another (Environment & Land Case
103 of 2015) [2024] KEELC 5107 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 103 OF 2015**

**BN OLAO, J
JULY 8, 2024**

BETWEEN

**GIRAIDO OMONGIN AKOBO 1ST APPLICANT
REDEMPTA IBURA 2ND APPLICANT
JOHN OKITWI OBUOLO 3RD APPLICANT
SAMMY BARAZA 4TH APPLICANT
LEONARD OJUMA OBWOLO 5TH APPLICANT**

AND

**OBORE KARANI SAMUEL 1ST RESPONDENT
PATRICK OPAMA OSILIMONG 2ND RESPONDENT**

JUDGMENT

1. By their amended Originating Summons dated 30th July 2020 and filed on the same date Giraido Omongin Akobo, Redempta Ibura, John Okitwi Obuolo, Sammy Baraza And Leonard Ojuma Obwolo (the 1st to 5th Plaintiffs respectively) impleaded Obore Karani Samuel And Patrick Opama Osilimong (the 1st and 2nd Defendants respectively) seeking a determination of the following issues with regard to the land parcel NO South Teso/Osuret/1411 (the suit land):
 1. The Plaintiffs herein GIraido Omongin Akobo, Redempta Ibura, John Okitwi Obuolo, Sammy Baraza And Leonard Ojuma Obwolo be declared the absolute owners of the land parcel No South Teso/Osuret/1411.
 2. That the Defendants Obore Karani Samuel and Patrick Opama Osilimong be ordered to execute all documents of transfer in respect of the parcel of land NO South Teso/Osuret/1411



in favour of the Plaintiffs failure to which the Deputy Registrar of this Honourable Court be empowered to execute the same on behalf of the Defendants.

3. That the Defendants, their agents, servants and/or workers be restrained permanently by an injunction from interfering with the said parcel of land that they may be occupying.
4. That the Defendant be ordered to give vacant possession of any part of the suit land herein that they may be occupying.
5. That the Defendants do meet the costs of this suit.
6. That this Honourable Court do grant such and further orders as it may deem fit and just to grant.

The grounds upon which the Originating Summons is grounded is that the Plaintiffs have been in actual occupation/possession of the suit land for over 12 years where they have built their homes and have also planted trees and crops.

2. In support of their claim, the 1st Plaintiff filed a supporting affidavit dated 15th September 2015 and also a statement dated 16th September 2015.
3. The gist of the supporting affidavit (which the 1st Plaintiff also swore on behalf of the 2nd and 3rd Plaintiffs) is that whereas the Defendants are the registered proprietors of the suit land, the Plaintiffs have been occupying it peacefully having built their homes thereon and all their relatives and neighbours regard them as the owners thereof. That they have built their homes and also plant crops on the suit land but the Defendants are not willing to transfer the same to them. He added that he had the instructions to swear the affidavit on behalf of the 2nd and 3rd Plaintiffs and that the Defendants obtained the title to the suit land fraudulently and they should be enjoined from interfering with it and also be ordered to sign all the relevant documents to enable the Plaintiffs obtain the title thereto. In default, the Deputy Registrar of this Court be empowered to do so.
4. The 1st, 2nd and 3rd Plaintiffs also filed a short joint statement dated 18th September 2015 in which they repeated that they have been in occupation and possession of the suit land for over 12 years and that the Defendants should be ordered to surrender the title thereto to the Plaintiffs and be enjoined from interfering with the same.
5. The 4th Plaintiff Sammy Barasa also filed an affidavit dated 6th August 2019 in which he stated that he is the son to the 3rd Plaintiff and has been living on the suit land for the past 31 years since his birth in 1988. That his father the 3rd Plaintiff purchased the suit land from one Joseph Ogor Okisai on 22nd July 1987 at a consideration of Kshs.8,700. However, the said Joseph Ogor Okisai who was then the registered proprietor of the suit land passed away before transferring the same to the 3rd Plaintiff and his son Obore Karani Samwel filed a succession cause without the Plaintiffs' knowledge and registered the suit land in his name. That the Defendants have never been in occupation of the suit land where the 4th Plaintiff, his wife and their five children have continued to occupy peacefully, quietly, continuously and un-interrupted for over 31 years.
6. Leonard Ojuma Obwolo the 5th Plaintiff is also a son to the 3rd Plaintiff. He too filed an affidavit dated 6th July 2019 in which he deposed, inter alia, that 3rd Plaintiff purchased a portion of land measuring 170ft by 40ft comprised in the land parcel NO South Teso/OsuretTE/1411 from Joseph Ogor Okisai on 22nd July 1987 at a consideration of Kshs.8,700. That he was born on the suit land in 1968 and has lived there and also planted maize, cassava and indigenous trees. That he has been in continuous, peaceful and un-interrupted occupation of the suit land for over 50 years and the Defendants have



never utilized it. He therefore prays for orders that he has acquired the suit land by way of adverse possession.

7. The Plaintiffs also recorded the statements of their witnesses Saferio Ekodo Idewa (PW3) and Sebastiano Omusugu (PW5) both dated September 2016. They are both neighbours to the Plaintiffs who, they confirm, have lived on the suit land since the witnesses were born which is 1997 (in the case of Saferio Ekodoi Idewa – PW3) and 1971 (in the case of Sebastian Omusugu – PW5). They both state that the Plaintiffs have put up homes and planted trees and other crops on the suit land but the Defendants have never lived thereon. They therefore support the Plaintiffs' claim to the suit land.
8. The Plaintiffs filed the following documents in support of their case:
 1. Copy of a land sale agreement dated 20/4/1990 between Ogor Okisai Joseph And Philip Miyodi.
 2. Copy of a land sale agreement dated 21/8/1994 between Ogor Okisai Joseph And Philip Miyodi being acknowledgment of receipt of the balance of the purchase price.
 3. Copy of acknowledgment of receipt of balance of purchase price between Giraido Omogin Akobo And Joseph Okisai dated 7/1/2003.
 4. Copy of a letter dated 28/7/2011 from the Chief Amukura addressed to whom it may concern under ref "Land Parcel S. Teso/Osurette".

This letter was however objected to during trial and was only marked as MFI-P2.
 5. Confirmed Grant issued in Busia High Court Succession Cause No 7 of 2011 in respect to the Estate Of Joseph Ogori Okisai To Obore Karani Samwel And Patrick Opama Osilimong on 15/11/2011.
 6. Caution placed on the land parcel NO South Teso/Osuret/1411 by the 1st Plaintiff Kiraido Omogin Akobo on 26/10/2011.
 7. Green card to the land parcel NO South Teso/OsuretTE/1411.
9. The Originating Summons is opposed and the 1st Defendant filed a replying affidavit dated 9th February 2016 and sworn also on behalf of the 2nd Defendant in which he deposed, inter alia that the suit land belonged to the late Ogori Okisai alias Joseph Ogori Okisai Odeke who died intestate on 13th October 2009. That the deceased was his brother and so he filed Busia High Court Succession Cause No 7 of 2011. That when the Plaintiffs learnt that he had filed the Succession Cause, they filed summons for revocation of the grant but later withdrew it. The Plaintiffs then approached the 1st Defendant through 3rd parties seeking to be allowed to cultivate a portion of the suit land. That throughout the life of the deceased, the Plaintiffs never occupied nor used the suit land and during the deceased's burial, the Plaintiffs did not make any claim to the same.
10. That this is an attempt by the Plaintiffs to try their luck and get the suit land having withdrawn their objection to the succession proceedings. That the Plaintiffs have never been in peaceful and quiet occupation of the suit land or used it for over 12 years and they are not entitled to the orders sought. Their Originating Summons lacks merit and should be dismissed.
11. The Defendants filed the following documents:
 1. Copy of confirmed Grant issued in Busia High Court Succession Cause No 7 of 2011.
 2. Summons for revocation or annulment of Grant dated 28th July 2011.



12. The hearing commenced before Omollo J on 15th February 2022 who heard the Plaintiffs' evidence. I heard the Defendants' case on 2nd November 2023. The parties testified and also adopted as their evidence the contents of their respective affidavits and statements which I have already summarised above. They also produced in support of their cases the documents filed. Although the Defendants filed statements of other witnesses, only the 1st Defendant testified.
13. Submissions were thereafter filed both by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Plaintiffs and by Mr Were instructed by the firm of Gabriel Fwaya Advocates for the Defendant.
14. I have considered the evidence by the parties as well as the submissions by counsel
15. The Plaintiffs are seeking orders that they have acquired the suit land by way of adverse possession. Section 38 (1) of the [Limitation of Actions Act](#) allows a party to approach this Court seeking such and order. It reads:

38(1) "Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, and 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 proprietor of the land."

It is now well established that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the [Limitation of Actions 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 of the adverse possession – Benjamin Kamau & Others -v- Gladys Njeri C.a. Civil Appeal No 2136 of 1996.

16. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 I KLR 184, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It said:

"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 either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition."

Such possession must be without force, stealth or the permission of the owner *Kimani Ruchine -v- Swift Rutherford Company Ltd* 1980 KLR 10. In the case of [Mtana Lewa -v- Kabindi Ngala Mwangandi C.a Civil Appeal No 56 of 2014](#) [2015 eKLR], the Court described the doctrine of adverse possession in the following terms:

"Adverse possession is essentially a situation where a person takes possession of land and asserts 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, the period is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#) ..."

Adverse possession is a fact to be observed on the land itself – *Maweu -v- Liu Ranching & Farming Co-operative Society Ltd* 1985 KLR 450. Further, the identification of the land being claimed by way of adverse possession is important. In the case of [Wilson Kazungu Katana & 101 Others -v- Salim](#)



Abdalla Bakshwein C.a. Civil Appeal No 11 Of 2014 [2015 eKLR], the Court of Appeal observed that:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu -v- Ndeete* 1984 KLR 776.”

And in the case of *Gabriel Mbui -v- Mukindia Maranya* 1993 eKLR Kuloba J said the following about the identification of the land being claimed in adverse possession:

“The land or portion of the land adversely possessed must be defined or at least an identifiable portion with a clear boundary or identification. For this purpose, that which can be ascertained is certain, that which is definitive is positive. It must at least be so plotted that if not certain, it can be made certain.”

This Court will be guided by the relevant law and above precedents among others.

17. Before proceeding further, it must be clarified that adverse possession is a claim directed at the registered proprietor of the land in dispute or his legal representative. I have perused the Green Card to the suit land and it shows that the suit land was first registered in the name of Ogowor Okisai Joseph on 4th September 1989. On 17th June 2011, it was transferred, upon transmission, to Obore Karani Samwel the 1st Defendant before cautions were registered on the title by the 1st Plaintiff, one Philip Miyodi and the 3rd Plaintiff claiming purchaser’s interest. The suit land is not registered in the name of Patrick Opama Osilimong. And although the Confirmed Grant issued in Bungoma High Court Succession Cause No 7 of 2011 shows that the 2nd Defendant Patrick Orawa Osilimong has a share of 0.7 Hectares out of the suit land while the 1st Defendant Obore Karani Samwel has a share of 1.0 Hectares, the Green Card to the suit land shows that it was wholly registered in the name of the 1st Defendant on 17th June 2011. It is not registered in the name of the 2nd Defendant. In the circumstances, a claim to the suit land by way of adverse possession cannot be sustained as against the 2nd Defendant.
18. The claim as against the 2nd Defendant is hereby struck out and since he neither filed any pleadings on his own nor testified, he will not be awarded any costs.
19. As against the 1st Defendant, the Plaintiffs claim appears to be anchored on sale agreements between them and the then registered proprietor Joseph Ogowor Okisai. When he testified before Omollo J on 15th February 2022, the record shows that the 1st Plaintiff stated as follows in his evidence in chief:

“I come from Okwala in Teso South sub County. I made a witness statement, supporting affidavit dated – S. Teso/Osurette/1411. I knew about it in 1997 when the owner Joseph Owori decided to sell to me 1½ acres. After buying the land, I built a mabati house on the portion in 1998. I am using the 1½ acres to-date. The Respondents do not live on the suit land. We are four in possession i.e. John Okwiti, wife of Philip (2nd Applicant), Kamuran. The 4th and 5th Applicants have also built on it.

We had a sale agreement drawn. I paid Kshs.18,000 which I paid in full. The agreement is number 3 on the list produced as Pex 1. After the sale the vendor fell ill this created a delay in me getting a title. The area chief was aware of our transaction by drawing the letter dated 28/7/2011.”



An attempt to produce the said letter as part of the Plaintiffs documents was opposed by MR WERE counsel for the Defendant and it was only marked as “MFI-P2”. The 1st Plaintiff then continued in his oral testimony as follows:

“Joseph Owori has no relations with the 1st and 2nd Respondents. The 1st Respondent took out letters of (sic) illegally. I am replying on the grant issued to them produced as Pex 3. The caution placed on title Pex 4 and green card produced as Pex 5. I am seeking 1½ acres of the suit land and costs of the suit.”

Similarly, John Okwiti (PW2) said the following when he testified before Omollo J on 15th February 2022:

“I stay in Okwala and a peasant farmer. I know Okisai Joseph Owori. I have a sale transaction with him (Joseph). He sold me land on 22/7/1987 for Kshs.8,700. I paid the whole amount in that year 1987. Joseph Owori died but I do not remember the year.

I have built on the land while Joseph was alive and still cultivates to-date. He sold me ½ acre. I am in possession of the ½ acre to-date. There are four people on the land i.e. myself, 1st Applicant, 2nd Applicant, 4th Applicant and 5th Applicant. We are all purchasers living on the land. My claim is for ½ acre I purchased. The sale agreement is produced as Pex-6”.

When he was cross-examined by Mr Were, John Okwiti (PW2) said he has no claim against Joseph Owori. This prompted Mr Ashioya counsel for the Plaintiffs to withdraw the claim by the said John Okwiti who is the 3rd Plaintiff herein and that application was allowed by Omollo J with costs assessed at 75% awarded to the Defendants.

20. Leonard Ojuma Obwolo (PW4) the 5th Plaintiff is a son to the 3rd Plaintiff. When he testified before Omollo J on 15th February 2022, he too said the following is his evidence in chief:

“I made a witness statement dated 6/8/2019 which I adopt as my evidence in chief.

The 3rd Plaintiff is my father. He bought land from Obore Joseph measuring 170 ft by 40 ft. The land was purchased in 1987. JOHN and his children are the one using the land. Even me I use the land. I have built on the land in 1987 which I occupy to-date”.

21. The 2nd Plaintiff Redempta Ibura did not testify but in paragraph 2 of his supporting affidavit, the 1st Plaintiff Giraido Omongin Akobo averred that he had instructions to swear the supporting affidavit dated 15th September 2015 on behalf of the 2nd and 3rd Plaintiffs.
22. The averments by the Plaintiffs that they occupy the suit land were opposed by the 1st Defendant in his replying affidavit dated 9th February 2016. In paragraphs 4, 5, 6, 8 and 15 of that affidavit, he has deposed thus:

“ 4: That land parcel L.R S. Teso/Osuret/1411 belonged to the late Ogori Okisai alias Joseph Ogori Okisai Odeke.”

5: That Ogori Okisai died on 13/10/2009”.

6: That I did file Busia Succession Cause HCP&A 7 of 2011.”

8: That throughout the life time of Ogori Okisai, the Applicants never occupied or in any manner ever used any portion of land parcel LR S.teso/osuret/1411.”



- 15: That non of the Applicants has been in peaceful, quiet occupation of any portion of the subject matter at all.”

Since the Plaintiffs were asserting that they entered the suit land pursuant to land sale agreements executed between them and one Joseph Ogwori Okisai and that they have built houses thereon in which they live and have continued to do so peacefully for over 12 years, the burden of proof was on them to prove those assertions. Sections 107, 108 and 109 of the *Evidence Act* makes that clear. Those provisions read:

107

- (1) “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”
- (2) “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108: “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109: “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in it’s existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Since the basis upon which the Plaintiffs claim to have entered the suit land are the sale agreements filed herein, I have examined them keenly. Although the Plaintiffs’ list of documents dated 23rd October 2018 and filed herein on the same day suggests that those agreements were executed by the Plaintiffs and Joseph Ogwori Okisai in respect to the suit land, there is no mention in the said agreements that they relate to the suit land herein. Indeed, counsel for the Defendants has submitted as follows with regard to those agreements:

“The Plaintiffs produced documents they described as land sale agreements of 1990, 1994 and 2003. They are not legible. They do not appear to have been signed by the parties to it or witnesses. No parcel number can be identified from the alleged agreements. We do not know which parcel was being sold. There is no size of the portion sold.”

While on my part I have been able to see some signatures on the said agreements, I agree with Mr Were counsel for the Defendants that the said agreements do not indicate that the suit land was the one being transferred to the parties therein. As is clear from the case of *Wilson Kazungu Katana & 101 Others -v- Salim Abdalla Bakhshwein* (supra), the identification of the suit land in these proceedings “is an important and integral part of the process of proving adverse possession.” Such identification was crucial particularly in a case such as this where the Defendants have averred that the Plaintiffs have never occupied the suit land and any part thereof.

23. It is also clear from the record that the Plaintiffs attempt to produce as part of their evidence a letter dated 28th July 2011 purportedly from the Chief Amukura was objected to by Mr Were during the hearing on 15th February 2022. The letter was in reference to the suit land and states in the first paragraph thereof that the suit land belongs to John Okitoi, Giraido Omogin Akobo And Philip Miyodi. Although the letter bears the letterhead of the Chief’s Office Amukura, it was not signed and



it was on that basis that Mr Were raised his objection on 15th February 2022 and it was only marked as MFI-P2. The proceedings of that day before Omollo J read:

“Were: We object to the document. It is not signed and the name of the author is not given.

Hon. Justice A. Omollo

15. 2.2022

Court: Letter produced as MFI-P2.”

Since the letter dated 28th July 2011 was only marked as MFI-P2 following MR WERE’S objection, it was not formally marked as an exhibit and therefore, it is of no evidential value to be considered by this Court. This was considered in the case of *Kenneth Nyaga Mwige -v- Austin Kiguta & Others C.a. Civil Appeal No 140 of 2008* [2015 eKLR] where at paragraph 20, the Court said:

“Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the Court to have the document produced as an exhibit and be part of the record. If the document is not marked as an exhibit, it is not part of the record.”

In the case of *Des Raj Sharma -v- Reginam* (1953) 19 E.A.C.A. 310, it was held that there is a distinction between exhibits and articles marked for identification and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. Further, the Court of Appeal in the case of *Kenneth Nyaga Mwige -v- Austin Kiguta & Others* (supra) adopted the decision in the Nigerian case of *Michael Hausa -v- The State* 1994 7-8 SC NJ 144 where the Court held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use such document as evidence. There is nothing on the record to show that the letter dated 28th July 2011 was, subsequently produced as an exhibit following the objection by MR WERE. Therefore, the contents therein including that the suit land belongs to some of the Plaintiffs herein is not evidence to be considered by this Court. It follows from all the above that there is a doubt whether infact the land which the Plaintiffs occupy is the suit land or another parcel of land.

24. That doubt is further heightened by the fact that the 1st Plaintiff, together with John Okitoi And Philip Miyodi, having filed summons for the revocation or annulment of the Grant issued to the 1st Defendant in respect to the Estate of JOseph Ogwori Okisa later on withdrew it. In paragraphs 10, 11 and 12 of his replying affidavit, the 1st Defendant has deposed thus:

10: “That after I responded to the objection in the succession cause, the Applicants through 3rd parties including the chief approached me with a view of allowing them to start cultivating portion of the subject matter.”

11: “That on the 28/5/2014 the Applicants on realizing could not prove their claim, withdrew the objection and the grant was accordingly confirmed annexed hereto marked SK-2 is a copy of the certificate of Confirmation.”

12: “That in the premises, this suit is yet another attempt by the Applicants to try their luck to get the subject matter.”

The 1st Plaintiff and the others have not explained why the application for revocation or annulment of the Grant issued to the Defendants was withdrawn. This Court cannot help but



conclude that the only reason must have been the realization that in fact they have no legitimate interest in the suit land and that this suit, as deposed by the Defendants, can only be an attempt “to try their luck to get the subject matter.”

25. Finally, the Plaintiffs claim that they have built homes and planted trees and other crops on the suit land. Again the burden was on them to prove those claims. Nothing would have been easier than for them to avail, as part of their documentary evidence, photographs of their homes, trees and other crops on the suit land. That they did not do so can only lead to the inevitable conclusion that their homes, trees and crops are on a different parcel of land and not on the suit land.
26. From all the foregoing, it is clear that the Plaintiffs have been unable to prove that they are entitled to orders that they have acquired the suit land, or any portions thereof by way of adverse possession. It therefore did not come as a surprise when the 3rd Plaintiff, who had claimed that he purchased land measuring 1.32 hectares from Joseph Ogori, and on which the other Plaintiffs also reside, elected to withdraw his claim on 15th February 2022. The Plaintiffs’ claim to the suit land by way of adverse possession is for dismissal.
27. The up-shot of all the above is that having considered all the evidence herein, this Court makes the following disposal orders:
 1. The 3rd Plaintiff’s suit as against the Defendants is withdrawn with costs at 75% after taxation as per the orders dated 15th February 2022.
 2. The Plaintiffs’ suit as against the 2nd Defendant is struck out with no orders as to costs.
 3. The suit by the 1st, 2nd, 4th and 5th Plaintiffs as against the 1st Defendant is dismissed with costs to the 1st Defendant.

BOAZ N. OLAO

JUDGE

8TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 8TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE

8TH JULY 2024

Explanatory notes:

This Judgment was due on 16th April 2024 but I was away from the station most of March 2024 following a bereavement and thereafter a scheduled leave from 13th May to 1st July. That explains the delay which is regretted.

BOAZ N. OLAO

JUDGE

8TH JULY 2024

