



**Orodi v Musembe & another (Environment & Land Case
11 of 2016) [2024] KEELC 5137 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 11 OF 2016**

**BN OLAO, J
JULY 11, 2024**

BETWEEN

JAMES NAKHULO ORODI PLAINTIFF

AND

FRANCIS MUSEMBE 1ST DEFENDANT

REDEMPTA M. OYEYO 2ND DEFENDANT

JUDGMENT

1. This judgment was due for delivery on 18th April 2024. However, following my bereavement in March 2024, it was not delivered as scheduled. Thereafter, I proceeded on my pre-arranged annual leave from 13th May 2024 upto 1st July 2024. The judgment is being delivered soon after my resumption of duty. The above explains the delay in delivering the judgment and the same is highly regretted.
2. By an amended Originating Summons filed herein on 11th February 2016 and amended on 10th September 2020, James Nakhulo Orodi (the Plaintiff herein) impleaded Francis Musembe and Redempta M. Oyeyo (the 1st and 2nd Defendants respectively) and sought a determination by this Court of the following questions with regard to the land parcel No Bukhayo/bugengi/7048 (the suit land);
 - 1: Whether the Plaintiff has been in open and notorious possession of a portion of land measuring 0.40 Ha comprising of LR. No Bukhayo/bugengi/7048 for a period exceeding 12 years.
 - 2:
 - (a) Whether the 1st and 2nd Defendants title to L.R No Bukhayo/Bugengi/7048 measuring 0.40 Ha has become extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said land.
 - 2:



- (b) Whether the 1st Defendants' rights over the parcel L.R No Bukhayo/Bugengi/7048 was lapsed by operation of law as at 6th November 2014 when the 1st Defendant transferred L.R No Bukhayo/Bugengi/7048 to the 2nd Defendant.

2:

- (c) Whether the Plaintiff has now acquired title to the said land by virtue of adverse possession.

2:

- (d) Whether the registration of Redempta Madiro Oyeyo as owner of L.R No Bukhayo/Bugengi/7048 should be cancelled and the Plaintiff be registered as owner of L.R No Bukhayo/Bugengi/7048 measuring 0.40 Ha.

5:

- (a) Who should pay the costs of this cause.

Arising out of the above determinations, the Plaintiff sought the following orders:

1. The rights of Francis Musembe and Redempta M. Oyeyo over L.R No Bukhayo/Bugengi/7048 measuring 0.40 Ha got extinguished by adverse possession upon expiry of 12 years from the date the Plaintiff came into possession.
 2. That the Defendants be perpetually barred from taking and/or using L.R No Bukhayo/Bugengi/7048 measuring 0.40 Ha which has been in possession of the Plaintiff since 27th July 2000 to-date.
 3. That the Plaintiff be registered as the proprietor of L.R No Bukhayo/Bugengi/7048.
 4. That the 2nd Defendant do execute all the relevant documents to facilitate the transfer of L.R No Bukhayo/Bugengi/7048 into the name of the Plaintiff and in default the Deputy Registrar do execute the same in the place of the 2nd Defendant.
 5. That the Defendants do pay the costs of this cause.
3. The Plaintiff filed a supporting affidavit dated 10th September 2020 in which he deposed, inter alia, that on 27th July 2000 he purchased a parcel of land measuring 0.40 Ha (1 acre) from the 1st Defendant out of the land parcel No Bukhayo/Bugengi/6313 as per the land sale agreement annexed thereto. That he took possession of the said portion of land from 27th July 2000 and established thereon his matrimonial home and on which he also does small scale farming. That un-known to him, the 1st Defendant subdivided the land parcel No Bukhayo/Bugengi/6313 into various portions and he discovered that the land which he occupies is now the suit land as per the attached Green Card. He has been in open, actual and un-interrupted possession of the suit land since 27th July 2000 and is regarded by his neighbours as the absolute owner thereof having built a permanent house, kitchen, cow shed and planted crops there on. That by the time the suit land was transferred to the 2nd Defendant on 6th November 2014, he was still in open and actual possession thereof a fact which the 2nd Defendant was well aware of.
4. The Plaintiff also filed a statement of his witness Francis Wesonga (PW2) dated 16th March 2021. He states therein that he has known the Plaintiff since he was born and on 22nd July 2000, he accompanied the Plaintiff during the execution of the sale agreement and was his witness in the purchase of one (1) acre of land. That the Plaintiff took immediate possession of the suit land where he has established his matrimonial home and also does farming. That the Plaintiff's occupation of the suit land has been



open, actual and uninterrupted and his friends, neighbours and relatives regard him as the absolute owner of the suit land.

5. The Plaintiff filed two lists of documents and also annexed some of the documents on his supporting affidavit.
6. The first list is dated 20th January 2016 and filed on 11th November 2016. It comprises the following documents:
 1. Copy of the Certificate of Official Search for the land parcel No Bukhayo/Bugengi/7048.
 2. Copy of the Green Card for the land parcel No Bukhayo/Bugengi/7048.
 3. Copy of land sale agreement dated 27th July 2000 between the Plaintiff and Francis Musembe Mugenya for the purchase of one (1) acre out of land parcel No Bukhayo/Bugengi/6313.

Those same documents were annexed to the supporting affidavit.

7. In his further list of documents dated 18th May 2021, the Plaintiff filed a copy of the judgment in Busia High Court Criminal Appeal No 10 of 2014 *James Nakbola Orodi v Republic*.
8. The 1st Defendant filed a replying affidavit dated 8th February 2021 in which he confirmed that in or around July 2000, the Plaintiff approached him with a request to purchase a portion of his land parcel No Bukhayo/bugengi/6313. He inspected the land and purchased a portion measuring 0.4Ha out of the said land as per their agreement dated 27th July 2000 and took possession and started residing and farming on it after paying full purchase price.
9. That in 2016, he was surprised when the Plaintiff filed this suit against him yet he had allowed him to take possession of the suit land since 2000 following their agreement. Upon conducting a search at the Lands Office, he discovered that the portion of land which he had sold to the Plaintiff was now registered as parcel No Bukhayo/Bugengi/7048 and was in the name of the 2nd Defendant. He therefore referred the matter to the Local Administration for assistance and was told to refer it to Court. He confirmed that the Plaintiff has been in peaceful occupation of the suit land since July 2000. He annexed to his replying affidavit a copy of the sale agreement between him and the Plaintiff dated 27th July 2000.
10. The 2nd Defendant filed two replying affidavits dated 28th July 2018 and 12th October 2020 in response to the Originating Summons.
11. The gist of both affidavits is that she had purchased the suit land from one Alice Awino Kona vide a sale agreement dated 10th March 2014 having undertaken due diligence including attending the Land Control Board. That although the Plaintiff alleges to have purchased the suit land from one Francis Busera Mugenya, there is no proof of such sale as no sale agreement has been exhibited. That this case is only a scheme by the Plaintiff to grab the suit land from her and she has been advised by her Advocate that the interests of an un-registered buyer cannot override those of a registered proprietor. Further, that the Plaintiff having been charged in Busia Chief Magistrate's Court Criminal Case No 2099 of 2012, he cannot claim to have been in open and peaceful occupation of the suit land for 12 years.
12. That this suit is bad in law since it offends the provisions of Order 4 of the [Civil Procedure rules](#) and the Plaintiff is only a trespasser on the suit land and should be evicted therefrom.
13. The 2nd Defendant filed the following documents as per her list dated 28th July 2018:
 1. Copy of sale agreement dated 10th March 2014 between her and one Alice Awino Kona for the purchase of the suit land.



2. Green Card for the suit land.
 3. Application for Land Control Board's consent.
 4. Title deed to the suit land.
 5. Letter of Consent.
 6. Transfer Form.
 7. Payment receipts.
 8. Proceedings and Judgment in Busia Chief Magistrate's Court Criminal Case No 2099 of 2012.
14. The hearing commenced before Omollo J on 28th July 2022 when the Plaintiff testified. He adopted as his testimony the contents of his supporting affidavit and produced as his documentary evidence the documents filed herein. He also called as his witness Francis Wesonga (PW2) who also adopted as his evidence the contents of his statement which I have already summarized above.
 15. The 1st Defendant did not testify but I heard the 2nd Defendant's case on 18th December 2023. She too adopted as her testimony the contents of her two replying affidavits dated 28th July 2018 and 12th October 2020 and produced as her documentary evidence the documents filed on 28th July 2018.
 16. Submissions were thereafter filed both by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Plaintiff and by Ms Maloba instructed by the firm of Maloba & Company Advocates for the 2nd Defendant.
 17. The Plaintiff's claim is that he has acquired by way of adverse possession the suit land and that he should be registered as the proprietor thereof and the Defendants be perpetually barred from interfering with his use of the same.
 18. The 1st Defendant in his replying affidavit basically confirm the occupation and possession of the suit land by the Plaintiff. The 2nd Defendant alleges that the suit is a scheme by the Plaintiff to grab the suit land and that his occupation has not been quiet or peaceful.
 19. Section 38 (1) of the [Limitation of Action Act](#) empowers a party to approach the Court seeking orders that he has acquired land registered in the names of another by way of adverse possession. It reads:

“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.”

In [Kasuve v Mwaani Investments Ltd & another](#) 2004 I KLR 184, the Court of Appeal set out what a party seeking 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, stealthy and the permission of the owner i.e nec vi, nec clam, nec precario - *Kimani Ruchine v Swift Rutherford Ltd* 1980 KLR I. It must also be peaceful, open and with the owner's knowledge – *Robert Shume & Others v Samson Kazungu Kalama* 2015 eKLR.

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 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 ...”

I shall therefore be guided by the law and the above precedents among others in determining whether the Plaintiff is entitled to the orders sought against the Defendants in this Amended Originating Summons.

20. I must first start with the claim as against the 1st Defendant. Although he did not participate in the trial he filed a replying affidavit dated 8th February 2021 in which he confirmed having sold the suit land to the Plaintiff vide a sale agreement dated 27th July 2000 after which the Plaintiff took occupation and possession thereof. He is no longer the registered proprietor of the suit land. The same is registered in the name of the 2nd Defendant. As is clear from the provisions of Section 38 (1) of the *Limitation of Actions Act* (*supra*), a claim in adverse possession can only be made against the “registered as proprietor of the land”. Therefore, the 1st Defendant was wrongly impleaded.
21. In the circumstances, the claim as against the 1st Defendant is devoid of merit. It is hereby dismissed with costs.
22. As to whether or not the Plaintiff has been in occupation and possession of the suit land since 27th July 2000, that has not only been confirmed in the Plaintiff's supporting affidavit and the statement of his witness Francis Wesonga (PW2) but also by the 2nd Defendant in her replying affidavit dated 28th July 2018 at paragraph 14 where he has deposed thus:
 - 14: “That I make and swear this affidavit in opposition of this case praying that the Originating Summons suit be dismissed and Plaintiff be ordered evicted from the suit land.” Emphasis mine.The Plaintiff's occupation and possession of the suit land is therefore admitted by the 2nd Defendant because she could not be seeking to evict the Plaintiff therefrom unless the Plaintiff is indeed in occupation and possession of the suit land.
23. The 2nd Defendant has also deposed in paragraph 5 of the same replying affidavit thus:
 - 5: “That though the suit land emanated from Bukhayo/Bugengi/6313 from what Plaintiff/Applicant claims to have bought 1.0 acres from one Francis Busera Mugenya there is no prove of such purchase as no valid agreement of sale is exhibited.”The Plaintiff's case, as per paragraph 3 of his supporting affidavit is:



3: “That sometimes on 27th July 2000 I purchased a parcel of land measuring 0.4 Ha (1 acre) from land parcel number Bukhayo/Bugengi/6313 from one Francis Musemba the 1st Respondent herein. Attached and marked JNO-1 is a copy of land sale agreement.”

Indeed a copy of the sale agreement executed by the Plaintiff and the 1st Defendant Francis Musemba Mugenya is among the documentary annexed produced herein in support of the Plaintiff’s case. It is not clear where the 2nd Defendant got the name Francis Busera Mugenya unless of course that is a typographical error. The sale agreement was witnessed by among others Francis Wesonga (PW2) who confirmed the transaction when he testified in support of the Plaintiff’s case. It cannot therefore be seriously disputed that the Plaintiff has been in occupation and possession of the suit land from 27th July 2000 to-date and that means that by the time he filed this suit on 11th February 2016, the Plaintiff had been in occupation and possession of the suit land for a period of 15 years and 7 months which is above the 12 years statutory period. It is also not disputed that the Plaintiff fully paid the purchase price. A person in occupation and possession of the land after paying the full purchase price is one in whose favour time for purposes of adverse possession begins to run – *Public Trustee v Wanduru Ndegwa* C.A. Civil Appeal No 73 of 1982 [1984 eKLR]. In that case, Madan J A (as he then was) said:

“A purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run under Section 10 (1) of the English Limitation Act 1939 (closely akin to our Section 7) as against the vendor: *Bridges v Mees* (1957) I CH 475 of 484; referred to with approval by this Court in *Mwangi Githu v Livingstone Ndeete & Others* C.a. No 24 of 1979 (unreported)”

Was the Plaintiff’s occupation and possession of the suit land peaceful? In an attempt to demonstrate that it was not, the 2nd Defendant has deposed in paragraph 9 of her replying affidavit dated 28th July 2018 thus:

9: “That it is not true that the Plaintiff has lived on the suit land quietly, peacefully, less interference; on the contrary the Plaintiff was charged with the offence of forcible detainer c/ s 91 of Penal Code Act vide Busia CM CR Case No 2099 (2012)”

It is true from the documents filed by the 2nd Defendant that on 23rd November 2012, the Plaintiff was charged in Busia Chief Magistrate’s Court vide Criminal Case No 2099 of 2012 with the offence of forcible detainer contrary to Section 91 of the Penal Code. The particulars of the charge are relevant to this judgment and I shall therefore cite them in extenso:

“James Nakhulo Orodia on 20th day of November 2012 of Bugengi village Bugengi sub-location Bukhayo West location within Busia County being in possession of land parcel No Bukhayo/Bugengi/7048 of Alice Awino Kona without colour of right held possession of the said land in a manner likely to cause a breach of peace by contracting (sic) a pit latrine and ploughing against Alice Awino Kona who was entitled to the possession of the said land.”

He was convicted for that offence on 22nd April 2014 by Hon. C. I. Agutu RM and ordered to compensate the complainant in the sum of Kshs.100,000 or serve 1 year imprisonment. His appeal was however allowed and the conviction and sentence set aside by F. Tuiyot J in Busia High Court Criminal Appeal No 10 of 2014 on 17th February 2015.

24. Notwithstanding the results of the conviction and subsequent appeal, the fact is that the Plaintiff having taken occupation and possession of the suit land on 27th July 2000, he had been in open, quiet, peaceful and un-interrupted occupation thereof for a period of 12 years and 4 months by the time he was arraigned before the Chief Magistrate’s Court Busia on 23rd November 2012 to answer to the



charge of forcible detainer contrary to Section 91 of the Penal Code. That charge came rather late to interrupt the Plaintiff's occupation and possession of the suit land or to demonstrate that the same was not peaceful. Indeed I would have arrived at the same decision even if Tuiyott J had up-held the Plaintiff's conviction by the trial magistrate. That is because by the time the Plaintiff was charged in Court with that criminal offence, his right to the suit land had long crystallized and that of the then owner Alice Awino Kona had already been extinguished by operation of the law.

25. It is also true that by the time this Originating Summons was filed on 11th February 2016 before being amended on 10th September 2020, the 2nd Defendant was the registered proprietor of the suit land having purchased it from Alice Awino Kona pursuant to a sale agreement dated 10th March 2014. This has prompted the 2nd Defendant to aver in paragraph 8 of her replying affidavit dated 28th July 2018 thus:

8: "That I am informed by my Advocate on record which information I verily believe to be true that the interests of an un-registered buyer cannot override the interests of a registered proprietor and as such this suit is incompetent."

To reinforce that averment, her counsel Ms Maloba has submitted as follows at page 6 of her submissions:

"My Lord, issue number 2c on the amended Originating Summons has already been dealt with as above and so is issue 2d. The question worth asking is, has the 2nd Respondent committed any fraud for her title to be cancelled? We submit that the dealing and transaction was done without malice and fraud as both the seller and the buyer attended the relevant Land Control Board. Their transaction was above the Board and did not require the consent of the Applicant or the 1st Respondent."

Again it is of course correct, as provided in Section 26 (1) of the Land Registration Act, that the title to the suit land held by the 2nd Defendant is prima facie evidence that she "is the absolute and indefeasible owner" of the suit land. However, that title is always subject to any encumbrances, easements, restrictions, conditions or any overriding interests recognised in law. Section 28 (h) of the same Act identifies a claim to land by way of adverse possession as among those interests it provides that:

28 "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- (a) -
- (b) -
- (c) -
- (d) -
- (e) -
- (f) -
- (g) -
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription".



Therefore, whereas the 2nd Defendant's title deed issued on 6th November 2014 bestowed upon her the "absolute and indefeasible" ownership of the suit land, she still held that title subject to the overriding interests of the Plaintiff who was already in occupation and possession of the suit land. And even though the 2nd Defendant only obtained title to the suit land from Alice Awino Kona on 6th November 2014, the law is that such change of ownership of the suit land did not interrupt the Plaintiff's adverse possession thereof *Githu v Ndeete* 1984 KLR 776. Basically, therefore, even as the 2nd Defendant purchased the suit land from Alice Awino Kona, she simply held the same in trust for the Plaintiff.

26. The 2nd Defendant's counsel has also submitted at page 3 of her submissions that the sale agreement between the Plaintiff and the 1st Defendant did not satisfy all the requirements of the law such as attending the Land Control Board and obtaining the necessary consent. That is correct. However, in *Public Trustee v Wanduru Ndegwa (supra)*, the law was stated that the provisions of the *Land Control Act* have no application where the claim to land is by way of adverse possession.
27. Having considered all the evidence herein, I am satisfied that the Plaintiff has established a valid claim to the suit land by way of adverse possession as against the 2nd Defendant.
28. Ultimately therefore, this Court makes the following disposal orders with respect to the Plaintiff's suit.
 - 1) The suit as against the 1st Defendant is dismissed with costs.
 - 2) Judgment is hereby entered for the Plaintiff as against the 2nd Defendant in the following terms:
 1. The Plaintiff has acquired the title to the land parcel No Bukhayo/Bugengi/7048.
 2. The 2nd Defendant's title to the land parcel No Bukhayo/Bugengi/7048 has been extinguished by operation of the law.
 - 3) The 2nd Defendant shall within 30 days of this judgment surrender to the Land Registrar Busia for cancellation the original title deed to the land parcel No Bukhayo/Bugengi/7048 and also execute all the relevant documents to facilitate the issuance of a title deed in the name of the Plaintiff.
 - 4) In default of (3) above, the Deputy Registrar of this Court shall sign all such documents on behalf of the 2nd Defendant.
 - 5) The 2nd Defendant by himself, his agents or any other persons acting through him are hereby permanently barred from interfering with the Plaintiff's use and occupation of the land parcel No Bukhayo/Bugengi/7048.
 - 6) The 2nd Defendant shall meet the Plaintiff's costs.

BOAZ N. OLAO

JUDGE

11TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 11TH DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE



11TH JULY 2024

