



REPUBLIC OF KENYA



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**Wakwenje & another v Fulafu & another (Environment & Land Case
13 of 2018) [2025] KEELC 4557 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 13 OF 2018**

EC CHERONO, J

MAY 22, 2025

BETWEEN

JUSTUS LUARA WAKWENJE 1ST PLAINTIFF

JAMIN WANYONYI SABUNI 2ND PLAINTIFF

AND

JOSEPH WANJALA FULAFU 1ST DEFENDANT

JOSEPH SIMEON WANYONYI WANJALA 2ND DEFENDANT

JUDGMENT

1. Vide an Originating summons dated 29th March 2018, the plaintiffs seek answers to the following questions;
 1. Whether the plaintiffs have acquired title to the land comprised in Title No. Bokoli/Chwele/1192 through adverse possession?
 2. Whether the plaintiffs have been in open, quiet, continuous, exclusive and adverse possession of the land comprised in Title No. Bokoli/Chwele/1192 for a period in excess of twelve (12) years?
 3. Whether the Defendants' Title to the land parcel No. Bokoli/Chwele/1192 has been extinguished, and whether the said Title is being held by the Defendants legally and validly?
 4. Whether the plaintiffs should be forthwith registered as the legal owners of the land comprised in Title No. Bokoli/Chwele/1192.
2. If the answer to the four (4) questions hereinabove are in the positive. The plaintiffs seek the following orders



- a. A declaration be made that the defendants' right to the land comprised in Title No. Bokoli/Chwele/1192 got extinguished by adverse possession upon expiry of twelve (12) years and during which time the plaintiffs have remained in open, continuous, exclusive and adverse possession of the said land.
 - b. A declaration be made that upon expiry of the twelve (12) years wef 19/09/1970, the 1st defendant held the land comprised in Title No. Bokoli/Chwele/1192 in trust for the plaintiff and he had no capacity to sell the said land to the 2nd defendant.
 - c. In the alternative, a declaration be made that upon expiry of twelve years from 26/08/1986, the title of the 2nd defendant to the land comprised in Title No. Bokoli/Chwele/1192 got extinguished and he thereafter held the land in trust for the plaintiffs.
 - d. An order be made under section 38 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya that the name of the 2nd defendant as the owner of the land comprised in Title No. Bokoli/Chwele/1192 be cancelled and be replaced with the names of the plaintiffs herein, as the registered owners.
 - e. An order be made that the 2nd Defendant do execute all such documents as would facilitate the transfer of Title No. Bokoli/Chwele/1192 to the plaintiffs herein, and failing which the Deputy Registrar of this Hon. Court do execute all such documents.
 - f. An order be made condemning the defendants to pay the costs of this suit.
 - g. Such further or other order or relief that this Hon. Court may deem fit to grant.
3. During pre-trial conference, the parties agreed to proceed with the hearing of this suit by way of viva voce evidence. Both the plaintiffs and the defendants called one witness each.

Plaintiffs' Case

4. Justus Lumara Wakwenya (PW1) The witness identified himself as the 1st plaintiff herein. He referred to his affidavit in support of the Originating Summons sworn on 29th March 2018 and which his co-Applicant authorized him to swear and sought to adopt the same as his testimony-in-chief. He stated that they live on the suit land parcel No. Bokoli/Chwele/1192. He stated that he has also annexed numerous documents to his affidavit in further support of the Originating Summons which include a green card for the suit land measuring approximately 2.40Ha registered in the name of Joseph Simeon Wanyonyi Wanjala, the 2nd Respondent herein on 26/08/1964 . He stated that on 31/01/1986, the Respondents' father one Paulo Fulafu sold the original land parcel Bokoli/Chwele/751 Measuring ten (10) acres to his father Wakwenye Lumara at a consideration of Kshs. 5100/. A copy of the sale agreement was produced in evidence as 3(a). He stated that his father paid a down payment of Kshs, 1442 leaving a balance of Kshs. 3658. The witness referred to the same agreement containing some alterations/changes which he described as the original sale agreement indicating that a sum of Kshs. 4442 was paid as down payment leaving a balance of Kshs.658. The said sale agreement was also produced as P-Exhibit 3(b). He stated that upon executing the said sale agreement, his father was given possession of the suit land where they lived with their father and his brother Jamin Muloboti Sabuni until their father passed on in 1970. He stated upon demise of their father, they continued living on the suit land with his brother Jamin Muloboti and their families. He stated that they are not currently in possession and occupation of the entire 10 acres but they only six (6) acres of the suit land while Joseph Wanjala Fulafu occupies the remaining four(4) acres. He stated that the clan subdivided the land in 1970 and the four (4) acres was given to Joseph Wanjala Fulafu. He stated that in 1987, they were in the



suit land when police officers in accompanied of Joseph W. Fulafu, the 2nd Respondent herein came and arrested him and thereafter took him to the police station and was later taken to Kimilili Law Courts where he was charged the following day with the offence of forceful detainer. He stated that after the Respondents' father died in 1969, the clan held a meeting and resolved they were not going to pay the balance of Kshs.3658 but they were going to subdivide the land and give them six (6) acres. He stated that since then, they have been occupying the six (6) acres with his brother and their families to date.

5. On cross-examination, the plaintiff stated that his father bought land parcel No. Bokoli/Chwele/751 Measuring 10 acres at a consideration of Kshs.5100/ and paid a down payment of Kshs.1442/ leaving a balance of Kshs.3658 (P-Exhibit3(a) He stated that he was not a witness in the sale transaction. He was referred to P-Exhibit 3(b) and stated that it is the same agreement, only that it indicates that a down payment of Kshs.4442 was made leaving a balance of Kshs.658/

Defence Case

Joseph Wanjala Fulafu (DW1)

6. The witness was referred his Replying affidavit to the Originating Summons sworn on 18/06/2018 which he adopted as his testimony-in-chief. He was also referred copies of documents annexed to his Replying affidavit which include a sale agreement dated 31/01/1969, a green card for L.R No. Bokoli/Chwele/751, a Land Certificate for LR. Bokoli/Chwele/1192, a Ruling in Bungoma ELC Case NO. 138 of 2017 and Originating Summons in Kakamega Civil Case NO. 296 of 1987 (O.S)
7. Margaret Lusinde Wanjala Musa (DW2) The witness was referred to her affidavit in support of a Notice of Motion dated 5/4/2022 which she adopted as her testimony-in-chief. She also referred to annexures in the said affidavit which include a certificate of death, a letter from the area chief and a limited grant of letters of administration which she produced in her evidence. She also referred to her replying affidavit to the Originating Summons herein sworn on 16/11/2023 together with 4 annexures thereto which she relied in her testimony-in-chief. Finally, she referred to a green card in respect of the suit land which she also produced in her evidence.

Plaintiffs' Submissions

8. The plaintiffs, through the Firm of M/sKiarie & Co. Advocates framed four (4) issues for determination of this suit as follows;
 - a. How did the plaintiff obtain possession of the suit land (Bokoli/Chwele/1192) and has the said possession been adverse to the registered owner?
 - b. Whether the joint plaintiffs have been in open, continuous, exclusive and adverse possession of the suit land for a period in excess of twelve years
 - c. Whether the Defendant's title to the suit land has been extinguished, and whether the said title is being held in trust for the plaintiffs?
 - d. Whether the plaintiffs should be forthwith registered as the legal owners of the land comprised in title No. Bokoli/Chwele/1192
9. On the first issue, the learned Counsel submitted that by a sale agreement dated 31/01/1969, the defendants' father, one Paul Fulafu sold the land comprised in parcel No. Bokoli/Chwele/751 to the plaintiffs' father, one Wakwenji Lumara. He submitted that the demised premises measured approximately 10 acres at a consideration of Kshs. 5100/. A down payment of Kshs. 1442 was paid leaving a balance of Kshs. 3658. Upon execution of the sale agreement, the plaintiffs' father was given



possession. A similar agreement was produced by the defendant. However, the second version of the same agreement indicates a down payment of Kshs.4442 leaving a balance of Kshs.658/. He submitted that after the death of both the vendor and the purchaser in 1969 and 1970, the plaintiffs released four (4) acres to the family of Paulo Fulafu on account of unpaid balance and they retained six (6) acres in full and final settlement. He stated that the land sold was agricultural and subject to provisions of the Land Control Act and that Section 6 thereof required the parties to seek and obtain the consent of the Land Control Board within three (3) months from the date of the agreement in default, the sale transaction became null and void. He submitted that pursuant to section 22 of the Land Control Act, the purchaser was required to vacate the land and failure to move out made the occupation of the land illegal and forceful. He submitted that the three (3) months w.e.f 31/01/1969 expired on 30/4/1969 and that the plaintiffs' occupation with effect from 01/05/1969 was adverse to the registered owner and after his death to his estate. Reliance was placed in the following cases; Wambugu v Njuguna [1983] KLR 173, Wanje & Others v A.K Saikwa & Others [1984] Eklr, Maweu v Liu Ranching & Farming Coop Society Ltd, Civil Appeal NO. 2 of 1983, Kasuve v Mwaaani Investment Ltd & 4 Others [2004] KLR, Kisumu Civil Appeal NO. 351 of 2002 between Joseph Mutafari Situma v Nicholas Makhanu Cherongo, Hosea v Njiru & Others [1974] E.A 526, Mombasa C.A Civil Appeal NO.84 of 2015 (Alfeen Mehdimohammed as Appellant and Basil Feroz Mohamed & 223 Others as Respondents [2016] eklr, Eliva Nyongesa and Another v Nathan Wekesa Omacha Civil Appeal NO.134 of 1993, Njuguna Ndatho v Masai Itumo & 2 Others, Civil Appeal NO. 231 of 1999, Gulam Miriam Noordin v Julius Charo Karisa, Civil Appeal NO. 26 of 2015 and Mtana Lewa v Kahindi Ngala Mwangandi Civil Appeal NO. 56 of 2014.

Respondents Submissions.

10. The Respondents through the Firm of M/s Chengasia Murunga & Co. Advocates submitted on the following four issues;
 - a. Whether the plaintiffs' paid the entire consideration of the purchase price in respect to Land parcel No. Bokoli/Chwele/751 to the 1st defendant's father
 - b. Whether the plaintiff has satisfied the ingredients/threshold for the grant of an order of adverse possession
 - c. Whether the plaintiffs' suit is res judicata and
 - d. Who should be condemned to pay costs
11. On the first issue, it was submitted that the 1st plaintiff produced an original agreement dated 31st January 1969 as P-Exhibit 3(b) which shows that Paulo Fulafu sold his entire land parcel No. Bokoli/Chwele/751 Measuring 10;12 acres to Wakwenje Lumara at an agreed consideration of Kshs. 5100 and upon execution of the agreement, the purchaser paid a down payment which the seller acknowledged receipt of Kshs. 1442/ leaving a balance of Kshs.3658/ which amount the 1st plaintiff confirmed during cross-examination.
12. On the second issue, the Respondents submitted that for a litigant to succeed in a claim founded on adverse possession, the court must be satisfied that the Applicant has demonstrated peaceful, open, exclusive possession of the suit property as of right without interruption from the registered owner for a period more than 12 years. He relied in the Black's Law Dictionary, 9th Edition and the following cases; Nerima Karani v William Wanyama Ndege [2012] KLR cited in the case of Wambugu v Njuguna [1983] KLR 171. It was submitted that from the sale agreement dated 31st January 1969, it is clear that the consideration for the purchase of the suit land parcel No. Bokoli/Chwele/751 was at Kshs. 5100 and upon execution of the said sale agreement, Kshs. 1442 was paid leaving an outstanding balance of



Kshs. 3658/= which the 1st plaintiff confirmed owing during cross-examination. He submitted that an order for adverse possession is not available to the plaintiffs since they never paid the 1st defendant's father the outstanding balance of Kshs.3658/=and therefore have not established the threshold for the claim of adverse possession. Reliance was placed in the case of Sisto Wambugu v Kamau Njuguna [1983] KLR which cited the case of United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968]1 ALL ER 104

13. On the third issue whether the plaintiffs' suit is res judicata, the Respondents' Counsel answered in the affirmative and submitted that this suit is res judicata.
14. As regards costs, the learned Counsel submitted that the plaintiffs should be condemned to pay costs. He relied in the case of; Hussein JanMohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] E.A 287.

Legal Analysis And Decision

15. I have considered the Originating Summons dated 29th March 2018, the Replying affidavits by Joseph Simeon Wanjala Wanyonyi and Joseph Wajal Fulafu both sworn on 18/06/2018, the annexures to the said pleadings, the written submissions and the applicable law. The gist of the Applicants' claim is for adverse possession. The Black's Law Dictionary 9th Edition defines Adverse possession as follows;
"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious."
16. In the case of; Leonola Nerima Karani v William Wanyama Ndege [2012]eklr, the court cited with approval the case of Wambugu v Njuguna [1983] KLR 171 which laid down the guiding principles on adverse possession as follows;
 - a) The general principle is that until the contrary is proved possession in law follows the right to possess.
 - b) In order to acquire by statute of limitation title to land which has a known owner, must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
 - c) The *Limitation of Actions Act*, in adverse possession contemplates two concepts, dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession over the same.
 - d) Where the claimant is in exclusive possession of land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined. Prior to the determination of the license, the occupation is not adverse but with permission. The occupation can only be with permission or adverse; the two concepts cannot co-exist.
 - e) The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.



- f) Adverse possession means that a person is in possession in whose favour time can run...
- g) Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...
- h) Where a claimant pleads the right to land on an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment."

17. Again in *United Dominions Trust (Commercial) Ltd v Eagles Aircraft Services Ltd* [1968] 1 ALL ER 104, the Court held as follows;

"Failure to perform part of the contract constitutes failure to perform whole. In the circumstances, the appellant was, in my view, entitled to repudiate the contract of sale of the suit land for failure of performance and as the respondent had failed to perform his part, he could not demand performance by the appellant. I would therefore hold that though there was originally a contract of sale of the suit land, the contract was lawfully repudiated by the appellant and no specific performance thereof in favour of the Respondent could be ordered."

18. I have looked at the sale agreement dated 31/01/1969 produced by the Applicant as P-Exhibit NO.3(a) which shows that the suit property land parcel NO.Bokoli/Chwele/751 measuring 10.12 acres was sold by one Paulo Fulafu to Wakwenje Lumara at a consideration of Kshs. 5100. The purchaser made a down payment of Kshs. 1442 leaving a balance of Kshs.3658. No evidence was shown that the said balance was paid by the purchaser or his representatives. In fact, the plaintiffs in their evidence confirmed that the said balance is still outstanding. The plaintiffs also produced another sale agreement of even date whose contents are similar except the down payment paid upon execution. In the second agreement, the deposit paid upon execution is given as Kshs. 4442/= leaving a balance of Kshs. 658/= Even then, no evidence has been shown that the said amount of Kshs. 658/=has been cleared. Applying the guiding principles set out in the case of *Wambugu v Njuguna* (supra), it is my finding that the Applicants have not paid the balance of the purchase price and the claim therefore fails. It is my view that failure by the Applicants to perform part of the contract constitutes failure to perform whole. I therefore find and hold that although there was originally a contract of sale of the suit land between the parties, that contract became null and void after the purchasers/Applicants failed to perform part of their bargain. The claim for adverse possession is therefore not available to the Applicants for failure to pay the balance of the purchase price.
19. The upshot of my finding is that this suit commenced by way of Originating Summons dated 29th March 2018 is devoid of merit and the same is hereby dismissed with costs to the Respondents
20. Orders accordingly.

READ, DELIVERED and SIGNED at Bungoma this 22nd Day of May, 2025.



HON. E.C CHERONO

ELC JUDGE

In the presence of;

M/S Masai H/B for Kiarie for the Plaintiffs/Applicants.

M/S Wakasa H/B for Mr. Murunga for the Defendants/Respondents.

Bett C/A.

