



**Oita v Emaero & 2 others (Environmental and Land Originating Summons  
40 of 2001) [2024] KEELC 6707 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6707 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2001  
BN OLAO, J  
OCTOBER 15, 2024**

**BETWEEN**

**NICHOLAS OTWANE OITA ..... PLAINTIFF**

**AND**

**RONALD OMODING EMAERO ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH OMOJONG EKALUGUT (SUBSTITUTED BY REMIGUIS OKUBALA  
ELUNGATA) ..... 2<sup>ND</sup> DEFENDANT**

**VINCENT EMAIRO EKARUGUT ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Nicholas Otwane Oita (the Plaintiff herein) approached this Court vide his Originating Summons dated 19<sup>th</sup> November 2001 and filed on 22<sup>nd</sup> November 2001. In an earlier ruling delivered on 8<sup>th</sup> February 2024, I decried the fact that this matter had taken too long to determine and implored the parties to have it expedited. Happily, that is now water under the bridge.
2. The plaintiff impleaded Ronald Omoding Emaero, Joseph Omojong Ekalugut (now deceased and substituted with Remiguis Okubala Elungata) and Vincent Emairo Ekarugut (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively) claiming to have acquired the land parcel No South Teso/Amukura/1901 (the suit land) by way of adverse possession. He therefore seeks a determination of the following issues:
  1. Whether the plaintiff has been in open and notorious possession of the suit land for a period exceeding twelve (12) years continuously, without interruption, peacefully and without force.
  2. Whether the defendants' title to the suit land became extinguished upon the expiry of twelve (12) years from the time the plaintiff went into occupation and/or possession of the said land.
  3. Whether the plaintiff has now acquired title to the suit land by virtue of adverse possession.



4. Whether the registration of the defendants as the owners of the suit land should be cancelled and the plaintiff be registered as the proprietor thereof.
5. Who should pay costs of this case.

In support of his claim, the plaintiff filed a supporting affidavit dated 21<sup>st</sup> November 2001 and subsequently, a statement dated 11<sup>th</sup> July 2015.

3. In his affidavit, he has deposed that the suit land is registered in the names of the defendants but since 1983, he has been cultivating it peacefully, openly and un-interrupted. That he has used it as his personal property and all his neighbours, friends and relatives regard it as his property and having used it for a period in excess of twelve (12) years, he has acquired it by way of adverse possession hence this suit.
  4. In his statement dated 11<sup>th</sup> July 2015, the plaintiff added that he is the first son of Peter Otwane Bolele (now deceased) and who purchased from the defendants vide an agreement dated 20<sup>th</sup> April 1983 the entire parcel of land parcel NO SOUTH TESO/AMUKURA/446 then measuring 18.5 Hectares. His late father then gave him the said land as part of his inheritance. He then moved onto the land where he has put up a home and raised his family to date. However, the defendants have since the execution of the sale agreement and his entry onto the suit land refused to apply for consent of the Land Control Board to facilitate the registration of the land in his name. By reason of that refusal, the plaintiff became an adverse possessor of the said land six (6) months after the date of the sale agreement being 20<sup>th</sup> April 1983. By the time this suit was filed on 22<sup>nd</sup> November 2001, he had been in possession thereof for a period of eighteen (18) years.
  5. In the year 2000, he realized that the defendants had secretly sub-divided the land parcel No South Teso/Amukura/446 to create the suit land measuring 17.16 Hectares as well as land parcel No South Teso/Amukura/1902 measuring 1.34 Hectares. He discovered further that the defendants had sold the land parcel No South Teso/Amukura/1902 to a third party. He therefore placed a caution on the suit land to preserve it but has since 1983 to-date, openly, continuously and without interruption remained in possession of the suit land to date.
  6. Annexed to the supporting affidavit is a copy of the register to the suit land. It shows that the defendants have since 14<sup>th</sup> August 2000 been jointly registered as the proprietors of the suit land but the plaintiff lodged a caution thereon on 16<sup>th</sup> August 2000.
  7. The plaintiff also filed a list of documents dated 11<sup>th</sup> July 2015 and a supplementary list of documents dated 7<sup>th</sup> March 2023 in support of his claim.
  8. The following two (2) documents were annexed to the list dated 11<sup>th</sup> July 2015:
    1. Certified copy of the register to the land parcel No Teso/Amukura/1901.
    2. Copy of the land sale agreement dated 20<sup>th</sup> April 1983 between the defendants as vendors and Petro Otwane Bolele as purchasers of the whole land parcel No South Teso/Amukura/446.
- By the supplementary list of documents dated 7<sup>th</sup> March 2023, the plaintiff filed the following documents:
1. Copy of a letter dated 31<sup>st</sup> August 2000 from the Land Registrar Busia and addressed to the defendants.
  2. Copy of the Certificate of Search for the land parcel No South Teso/Amukura/1901.



3. Copy of receipt from the Commissioner of Lands.
4. Copy of a letter dated 2<sup>nd</sup> March 2023 addressed to the Land Registrar Busia by Manwari & Company Advocates.
5. Certified copy of the Register for the land parcel No South Teso/Amukura/446.

The plaintiff also filed a statement of his elder brother Africanus Ikapel Otwane (PW2) dated 11<sup>th</sup> July 2015. He confirmed that the plaintiff had purchased the whole of the original land parcel No South Teso/Amukura/446 then measuring 18.5 Hectares from the defendants at a consideration of Kshs.54,992.50 pursuant to a sale agreement dated 20<sup>th</sup> April 1983. The defendant took possession in 1983 and has been in occupation since then to-date. No consent of the Land Control Board was obtained formally but the defendants proceeded to sub-divide the said land into two portions being the suit land measuring 17.16 Hectares and land parcel No South Teso/Amukura/1902 measuring 1.34 Hectares and which was sold to a third party. That although the defendants have not transferred the suit land to the plaintiff, they have never filed any claim seeking to evict him therefrom.

9. The 1<sup>st</sup> defendant Ronald Omoding Emaero filed a replying affidavit dated 25<sup>th</sup> August 2006 on his own behalf and with the authority of the other defendants. He described the supporting affidavit by the plaintiff as scandalous, bad in law and incompetent. He also stated that the said affidavit is “un-dated and un-sworn” which is of course not true. It is both dated 21<sup>st</sup> November 2021 and was sworn before Balongo Advocate who affixed his stamp. He denied that the plaintiff has been on the suit land since 1983 adding that even if it is true, that stay has not been peaceful. That the plaintiff is a trespasser on the suit land and at the appropriate time, an application would be made by way of Preliminary Objection to have the suit struck out for offending the provisions of the Civil Procedure Rules. He added that the plaintiff cannot be registered as the proprietor of the suit land because he has not demonstrated how he entered the same and no documentary evidence has been availed. He therefore urged this court to dismiss the plaintiff’s suit.
10. The defendants did not file any documents in support of their case.
11. The plenary hearing commenced and was concluded on 29<sup>th</sup> April 2024. Both parties testified and adopted their respective affidavits as their testimony. The plaintiff produced as his documentary evidence the documents filed herein. He called as his witness his brother Africanus Ikapel Otwane (PW2) who also adopted as his evidence the contents of his statement which I have already summarized above. The defendant was the only witness who testified in support of his case. He adopted as his testimony the contents of his replying affidavit which I have also already referred to above.
12. Submissions were thereafter filed both by Mr Mogi instructed by the firm of Manwari & Company Advocates for the plaintiff and by the 1<sup>st</sup> defendant on behalf of the defendants.
13. I have considered the evidence by the parties as well as the submissions filed both by Mr Mogi and the 1<sup>st</sup> defendant.
14. The plaintiff’s case is that he has acquired by way of adverse possession the land parcel No South Teso/Amukura/1901, the suit land, having been in occupation and possession thereof peacefully, openly and un-interrupted since 1983. Section 38(1) of the *Limitation of Actions Act* which the plaintiff has invoked in this suit provides as follows with regard to a claim to land as based on adverse possession:



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 of this Act, 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 proprietor of the land.”

The plaintiff has also cited the provisions of Sections 7, 13, 17 and 37 of the same Act. They provide that:-

7: “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 person through whom he claims, to that person.”

13(1) “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

37: This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that-

- (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;”

In the case of *Kasuve v Mwaani Investments Ltd & Others C.A. Civil Appeal No 35 of 2002* [2004 eKLR], the court of Appeal addressed itself as follows:

“Section 38(1) of the Limitation of Actions Act Chapter 22 Laws of Kenya authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. And in order to be entitled to the 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 dispossessing the owner or by discontinuation of possession by the owners of his own volition – *Wanje v Saikwa (No 2)* 1984 KLR 284. A title by adverse possession can be acquired under the 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”).

The possession must be without force, stealth or the permission of the owners – *Kimani Ruchine v Swift Rutherford Company Ltd* 1980 KLR 10. It must also be open, continuous, peaceful, notorious and with the knowledge of the owner *Robert Shume & Others v Samson Kazungu Kalama* 2015 eKLR (C.A. CIVIL APPEAL NO 32 of 2015).



15. In the case *Mtana Lewa v Kabindi Ngala Mwangandi C.a. Civil Appeal No 56 of 2014* [2015 eKLR], the Court of gave the following description of the doctrine of adverse possession:

“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 be guided by the above precedents and others in determining this dispute.

16. It is common ground that the defendants are the registered proprietors of the suit land. The Register for the suit land shows that it is a sub-division of the original land parcel No South Teso/Amukura/446 first created on 7<sup>th</sup> December 1972 and which title was closed on 14<sup>th</sup> August 2000 to create the suit land and another parcel being South Teso/Amukura/1902. The suit land is currently registered in the names of the defendants with the original 2<sup>nd</sup> defendant now substituted with Remigus Okubala Elungata. And although this suit was filed on 22<sup>nd</sup> November 2001, a year after the original title had been closed, change of ownership does not affect or interrupt a claim of adverse possession – *Githu - v- Ndeete* (supra).
17. The plaintiff’s occupation and possession of the suit land since 1983 is also not really in dispute. The defendants tried to deny this and in paragraph 4 of the replying affidavit sworn on their behalf by the 1<sup>st</sup> defendant, it is deposed thus:

4: “That at any rate, it is not true that the Applicant has stayed on the land since 1983 and even if he has which is denied, the said stay has not been peaceful and un-interrupted.”

When cross-examined by this court, he said:

“It is true we sold the plaintiff’s father the land”.

And when the Court asked him why the suit land was not transferred to the plaintiff’s father, his response was that:

“He died before the transfer”.

That means that the purchase of the suit land by the plaintiff’s father vide a sale agreement dated 20<sup>th</sup> April 1983 and which is part of the plaintiff’s documentary evidence is acknowledged by the defendants. It is well established that a purchaser in occupation of land after paying the full purchase price is a party in whose favour time for purposes of adverse possession can begin to run – *Public Trustee v Wanduru Ndegwa C.A. Civil Appeal No 73 Of 1982* [1984 KLR]. Although the sale agreement is clear under the heading “consideration” that the purchase price was Kshs.54,992.50 of which a sum of Kshs.51,437.50 was paid at the execution of the sale agreement between the defendants and the plaintiff’s father Petro Otwane Bolele, I did not hear the defendants claim that the balance of Kshs.3,555.00 was never paid. What the defendants have alluded to in their submissions is that the consent of the Land Control Board was not obtained and neither were any transfer forms executed or stamp duty paid. However, as was again held by Madan JA (as he then was), in *Public Trustee -v- Wanduru* (supra), the provisions of the *Land Control Act* have no application where the claim to land is by way of adverse possession. The sale agreement was executed on 20<sup>th</sup> April 1983 and therefore it became void the moment under Section 6(1) of the *Land Control Act* when the necessary consent was



not obtained. However, as was held in the case of *Samuel Miki Waweru v Jane Njeri Richu C.A. Civil Appeal No 122 Of 2001* [2007 eKLR], the continued possession of the suit land by the plaintiff became adverse from the time the transaction became void. That means that even if time is computed from November 1983 when the sale agreement became void, by the time the plaintiff filed this suit on 22<sup>nd</sup> November 2001, he had been in occupation and possession of the suit land for 18 years well beyond the 12 years required to prove a claim to land by way of adverse possession.

18. It is also not in dispute that the plaintiff's occupation and possession of the suit land has been open, peaceful, continuous and with the knowledge of the defendants. No evidence has been led by the defendants to suggest that they have at any time tried to evict the plaintiff and his family from the suit land.

19. In their submissions, the defendants have questioned the locus standi of the plaintiff to prosecute this suit. That issue was earlier addressed by this court in the ruling delivered on 8<sup>th</sup> February 2024 following a Preliminary Objection raised by the defendants in which they were alleging that the suit land was purchased by the plaintiff's father and therefore the plaintiff had no capacity to file this case on behalf of his father. I addressed that issue as follows in paragraph 12 of my ruling in dismissing the Preliminary Objection:

12: "I have looked at the Originating Summons by the plaintiff herein. He has not moved to the court as a representative of his father's Estate. He has approached this court as the person in possession of the suit land. In paragraphs 2 and 3 of his supporting affidavit dated 21<sup>st</sup> November 2021, he has deposed that he has "been in possession of the land parcel No South Teso/Amukura/1901" and adds "since 1983 have been cultivating the said parcel of land peacefully, openly and uninterruptedly (sic)". Therefore, even if the land was first purchased by his father as stated by the defendants, the plaintiff's case is that he has been in possession of the same since 1983. Whether his claim for the land by way of adverse possession will be established is really a matter to be determined on the evidence during the trial. However, having approached the court as the person in possession, it cannot be true to allege that he lacks the locus standi, to prosecute this case."

The issue of the plaintiff's capacity having been addressed and determined by this court in an earlier ruling, it cannot again be raised by the defendants in their final submissions. Suffice it to state that having now considered the evidence by the parties, I am satisfied that the plaintiff has established to the required standard that he is entitled to an order that he has acquired the suit land by way of adverse possession.

20. Ultimately therefore, there shall be judgment for the plaintiff against the defendants in the following terms:

1. The plaintiff has acquired the land parcel No South Teso/Amukura/1901 by way of adverse possession.
2. The defendant's title to the land parcel No South Teso/Amukura/1901 has been extinguished by operation of the law.
3. The defendants shall within 45 days from the date of this judgment surrender the original title deed for the land parcel No South Teso/Amukura/1901 to the Land Registrar Busia for cancellation and execute all the necessary documents to facilitate the registration of the said land in the name of the plaintiff.
4. In default of (3) above, the Deputy Registrar of this Honourable Court shall be at liberty to execute the said documents on behalf of the defendants to enable the Land Registrar transfer the land parcel No South Teso/Amukura/1901 in the name of the plaintiff.



5. The Defendants shall meet the plaintiff's costs of this suit.

**BOAZ N. OLAO**

**JUDGE**

**15TH OCTOBER 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 15TH DAY OF OCTOBER 2024.**

Right of Appeal.

Mr. Mogi for the Plaintiff present.

1<sup>st</sup> Defendant present in person.

2<sup>nd</sup> Defendant present in person.

3<sup>rd</sup> Defendant present in person.

**BOAZ N. OLAO**

**JUDGE**

**15TH OCTOBER 2024**

