



**Opanda v Ondachi (Environment & Land Case 5 of 2021)
[2024] KEELC 6622 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 5 OF 2021**

E ASATI, J

OCTOBER 9, 2024

**(FORMERLY KAKAMEGA ELC CASE NO.208 OF 2015 (OS))
IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT,
CAP 22 OF THE LAWS OF KENYA, SECTIONS 7, 17 & 38(1)**

AND

**IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP
OF LAND PARCEL NO. E. BUNYORE/EBUSAMIA/269**

BETWEEN

JOSEPHAT AKHAYA OPANDA APPLICANT

AND

BUNYALI ONDACHI RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 15th July, 2015, the Applicant herein, Josephat Akhanya Opanda, who claims to have acquired the whole land parcel number E/Bunyore/Ebusamia/269 measuring 0.32(Ha) by adverse possession presented the following question for determination herein: -
 - a. whether the Applicant has been in peaceful, continuous occupation and use of the whole of L.R. No. E/Bunyore/Ebusamia/269 measuring 0.32(Ha) for years with the Respondent's knowledge.
 - b. Whether the Applicant has acquired the whole of L.R. No. E/Bunyore/Ebusami/269 measuring 0.32 Ha. by adverse possession
 - c. whether the Respondent's name should be cancelled from the register and the whole of L.R. No. E/Bunyore/Ebusamia/269 measuring 0.32 Ha registered in the Applicant's name as the proprietor thereof.



2. The Originating Summons was supported by the by the averments in the Affidavit in the Affidavit in Support of Originating Summons sworn by the Applicant on 15th July, 2015 and the annexures thereto.
3. In response to the Originating Summons, the original Respondent, Bunyali Ondachi filed a Replying Affidavit sworn on 25th August, 2015 wherein he denied the Applicant's claim. The original Respondent also filed a Notice of Preliminary Objection dated 25th August, 2015. The Preliminary Objection was heard and dismissed vide court ruling delivered on 15th May, 2018.
4. In the pendency of the suit, the original Respondent, Bunyali Ondachi, died and was substituted with Josephat Ondachi Bunyali vide the court ruling dated 9th March, 2023.
5. Directions under Order 37 rules 16 and 19 of the Civil Procedure Rules 2010 on the manner of disposal of the Originating Summons were taken and the matter proceeded by way of viva voce evidence.

The Evidence

6. The evidence of the Applicant comprised of his testimony and the exhibits he produced. He testified as PW1 and adopted the contents of his witness statement dated 15th July, 2015 and the Affidavit sworn on even date as his evidence in chief. He had stated in the witness statement that ever since he was born in the year 1984 he has been staying on the L.R. No. E/Bunyore/Ebusamia/269, the suit land herein. That the suit land is registered in the name of Bunyali Ondachi. That together with his family, he has stayed on the suit land openly, continuously and peacefully with the knowledge of Bunyali Ondachi for a period of over 12 years. That he has established his home there. He has been planting food crops like maize, beans, bananas and trees which are mature. That he has stayed on the land for over 30 years. That he attained the age of majority in the year 2002.
7. He denied that he was a tenant on the suit land and further denied that there was rent of Kshs.300 per month payable by him. That his father bought the land. He stated further that the family of the Respondent do not utilize the land.
8. That there was a case filed by the Respondent to stop the burial of the Applicant's father on the suit land but that the suit was later dismissed and deceased buried on the land.
9. The Plaintiff produced a bundle of documents containing land sale agreement, translation of the agreement, photographs, court order issued on 17th December, 2019 and green card in respect of the suit land as exhibits.
10. On cross-examination, he stated that he did not know the year his father entered the suit land but he (applicant) was born there. That the purchase price for the land was paid in full in the year 1968. That the suit land borders L.R. No. s E/Bunyore/Ebusamia/161 and 218 belonging to the Applicant's father.
11. That they have built a shop on the land and at the rear of the shop, they have built 3 houses for him, his brother and his parents. That the Respondent knew all along that the applicant and his family were residing on the land.
12. And on re-examination, he stated that he had filed the suit in his personal capacity and not on behalf of his father. That he had not seen any report made to the area chief.
13. The Respondent's case comprised of the testimony of Josephat Ondachi Obunyali, the current Respondent and the exhibits he produced. He testified as DW1. He adopted the contents of the Replying Affidavit sworn by the original Respondent on 25th August, 2015. It was deposed that the



Applicant was a son to Ishmael Opanda Injili who, together with his family resided on the suit land as a tenant pursuant to an oral lease made between Bunyali Ondachi and the Applicant's father in 1970 for a monthly rent of Kshs.300. That upon the death of Ishameal Injili, the original Respondent filed suit to stop the burial namely Vlhiga Pmcc No.60 Of 2015, Samson Bunyali Ondachi –vs- Rosemary Opanda Injili & 4 Others. That in light of the suit still pending in the lower court, the suit herein is duplicitous, vexatious and an abuse of the court process since the lower court case also deals with the suit property.

14. That the Applicant has been living on the suit land by reason of being a dependant of the deceased. That any claim of adverse possession should be raised by or on behalf of the estate of the deceased and that the Applicant is neither the administrator nor personal representative of his father's estate.
15. He testified further that the Applicant's father used to pay the rent until the time of his death. That there are 3 people living on the suit land namely; Opanga Angote and DC Injili Wilson both of who started staying thereon in the year 1969, and Mariam Atetwe who got a lease of the land in the year 2000. That they knew that Ishmael and his family were residing on the land. That they do not live on or utilize the suit land.

Submissions

16. It was submitted on behalf of the applicant that the issues for determination in the suit were: -
 - a. whether the Respondent was the registered proprietor of the suit land.
 - b. Whether the applicant had been in possession of the suit land for 12 years
 - c. If so, had the said possession of the applicant been quiet, continuous and adverse to the title of the Respondent?
 - d. What orders should the court grant.
17. Counsel submitted that there was no dispute that the suit land was registered in the name of Bunyali Ondachi (deceased). Relying on the case of Gabriel Mbui vs Mukinda Maranya (19193)eKLR, Counsel for the applicant submitted that the applicant had demonstrated all the elements of adverse possession.
18. No submissions were filed for the Respondent.

Analysis of the evidence and determination of the Questions

19. The first question presented to this court for determination is whether or not the Applicant has been in peaceful, continuous occupation and use of the suit land for a period of more than 12 years with the Respondent's knowledge.
20. The Applicant's case as stated in the Originating Summons is that he has stayed on the whole of the suit land since he was born in 1984 and more particularly since the year 2002 when he attained the age of majority. That his occupation and use of the suit land has been continuous and exclusive of the Respondent.
21. He testified that he was born on the suit land and that since he attained the age of majority in the year 2002, he has lived peacefully and continuously on the suit land and occupied it exclusively together with the members of his family.
22. That he had established his home on the suit land and uses the land to cultivate food crops and trees.



23. The Respondent vide the Replying Affidavit and testimony in court admitted the Applicant's presence on the suit land. He also admitted that neither him nor the original Respondent lived on or utilized the suit land. The Respondent however, contended that the Applicant's stay on the suit land has not been peaceful or continuous. That the original Respondent had made a report to the area chief seeking that the Applicant's father vacates the land, that he had protested the burial of the Applicant's brother on the suit land and had filed a suit namely VIHIGA PMCC NO.60 OF 2015 seeking to stop the burial of the Applicant's father on the suit land. The Respondent however produced no evidence to show any of these claims.
24. The Applicant produced photographs to show the developments on the suit land. The Applicant also testified that he was not a party in the suit No.60 of 2015 which nonetheless ended and the deceased was buried on the suit land.
25. I have considered the evidence on record and find that the Applicant has demonstrated that he has been in peaceful, continuous occupation and use of the suit land for a period of more than 12 years with the knowledge of the Respondent.
26. The second question that was presented for determination is whether the Applicant has acquired the whole of L.R. No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) by adverse possession.
 1. Adverse possession is a doctrine of law through which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of the land to the exclusion of the registered owner for a prescribed period, in Kenya twelve years. Adverse possession is an extinctive process whereby a possessor of land acquires a right by extinguishing the legal right of another, the registered owner. The doctrine is anchored on the provisions of Sections 7, 13 and 38 of the Limitation of Actions Act. Section 7 prohibits filing of actions for recovery of land after the expiry of 12 years from the date the right of action accrued. This means that at the end of twelve years of occupation of land by an adverse possessor, the right of the registered owner of the land to recover the land is extinguished and the right of the adverse possessor to claim title to the land matured.
27. Counsel for the plaintiff relying on the case of *Gabriel Mbui vs Mukinda Maranya (19193)eKLR* where the court itemized the elements of adverse possession as: -
 - a. The intruder claiming right by adverse possession must make physical entry and must be in actual possession or occupancy of the land for the statutory period,
 - b. The entry and occupation must be with, or maintained under some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession against everyone else,
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, that is, without permission from the true owner of the land occupied.
 - d. The non-permissive adverse possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable *animus possidendi*,
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of his predecessors in title and to vest it in the encroacher or squatter unless the acts be done which are inconsistent with the owner's enjoyment of the soil for purposes for which he intended to use it,



- f. The possession by the person seeking to prove title by adverse possession must be visible, open, notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land and
- g. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period.
28. The Applicant's case is that his father entered the suit land as a purchaser, having bought the land in the year 1968 and paid the full purchase price in the same year. That he (Applicant) was born on the suit land in the year 1984 and has stayed thereon to date occupying the land exclusively, having his home thereon and utilizing the land to plant food crops and trees.
29. The case of the Respondent on the other hand was that the Applicant's father entered the suit land on the basis of a tenancy agreement at a monthly rental of Kshs.300/-. That the Applicant's father paid the rent until his death in the year 2015. However, no documents were produced to show the existence of the tenancy. No tenancy agreement or copies of receipts or receipt books for payment of rent were produced. It was also not shown what the subject of the tenancy was – whether it was the suit land or the houses thereon. The duration of the tenancy, if any was not disclosed. It is also not clear how the Respondent and his predecessor could allow the Applicant to establish his houses on the land that was only leased to the Applicant's father.
30. I find that the ingredients of adverse possession have been proved. There is no evidence as to why the Respondent and his predecessor never took steps to remove the Applicant from the land even after the Applicant attained the age of majority. I have read the plaint in VIHIGA PMCC NO.60 OF 2015.
31. The Applicant herein was not a party that suit. A court order dated 17th December, 2019 shows that the suit was dismissed.
32. I find that the Applicant has demonstrated that he has acquired title to the suit land by adverse possession.
33. The third question for this court's determination is whether the Respondent's name should be cancelled from the register and the whole of L.R. No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) registered in the Applicant's name as proprietor thereof.
34. Under section 17 of the Limitation of Actions Act, upon the expiry of the limitation period, the title of the registered proprietor become extinguished. Having found that the Applicant has had continuous and peaceful exclusive occupation of the suit land for a period in excess of 12 years and that he has acquired title to the suit land by adverse possession, it follows that the title of the registered proprietor of the suit land becomes extinguished at the expiry of the limitation period. Under section 28(h) of the Land Registration Act, rights acquired under adverse possession are overriding interests to which registered land is subject.
35. This means that although the title to the suit land is still in the name of the original Respondent, his title has become extinguished and he hold the land in trust for the Applicant who is the beneficiary of the overriding interest. The present Respondent who is the personal representative and/or administrator of the estate of the deceased has a duty to distribute the suit land in favour of the appellant.
36. I find that on the basis of the evidence placed before court, the suit land should be transferred to the Applicant.
37. The prayers sought in the Originating Summons are;



- a. a declaration that the Respondent's right over the whole of land parcel No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) got extinguished by adverse possession upon expiry of twelve (12) years when the Applicant was in possession.
 - b. a declaration that upon the expiration of twelve (12) years when the applicant was in possession of L.R. No. E/Bunyore/Ebusami/269 the whole of the land was held and is currently held in trust for the applicant
 - c. an order that the whole of land parcel No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) vests in the Applicant's name and that he should be registered as the owner thereof under section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 - d. An order that the Respondent do sign all relevant document to facilitate transfer of the whole of L.R. No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) to the applicant and that in default, the Deputy Registrar of this court to sign the same.
 - e. An order that the Respondent be condemned to pay costs of the suit.
 - f. Such further orders or relief as the honourable court deems just and reasonable to grant.
38. I find that the Applicant has proved his case on a balance of probabilities and is entitled to the relief sought.
39. Although under section 27 of the *Civil Procedure Act* costs ought to follow the event, in the circumstances of this claim I find it to be in the interest of justice that each party bear own costs of the suit.
40. The upshot is that this court herein enters judgement in favour of the Applicant for;
- i. a declaration right of the registered owner over the whole of land parcel No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) got extinguished by operation of the doctrine of adverse possession upon expiry of twelve (12) years when the Applicant was in possession.
 - ii. A declaration that the applicant has acquired title to the suit land parcel No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) by adverse possession.
 - iii. a declaration that L.R. No. E/Bunyore/Ebusami/269 held in trust for the applicant.
 - iv. An order for transfer of the whole of L.R. No. E/Bunyore/Ebusami/269 measuring 0.32(Ha) in favour of the applicant and that in default, the Deputy Registrar of this court to sign the requisite documents to effect transfer.
 - v. Each party to bear own costs of the suit.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 9TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Court Assistant- Ajevi

Nafuye h/b for Getanda for the Applicant/Plaintiff.



Edaki for the Respondent/Defendant.

