



Oballa v Nageri (Being sued as admin of the Estate of Nageri Nafula) (Environment & Land Case E046 of 2021) [2023] KEELC 16249 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E046 OF 2021**

**BN OLAO, J
MARCH 9, 2023**

BETWEEN

BENARD ODOLI OBALLA APPLICANT

AND

**CAXTON NAFULA NAGERI (BEING SUED AS ADMIN OF THE ESTATE OF
NAGERI NAFULA) RESPONDENT**

JUDGMENT

1. Benard Odoli Oballa (the plaintiff) approached this court vide his Originating Summons dated August 27, 2021 and filed on September 17, 2021 in which he impleaded Caxton Nafula Nageri (the Defendant) who is sued as the Legal Representative of Nageri Nafula (the deceased). He claimed to have acquired 4 acres out of the land parcel No Bunyala/Bulemia/264 (the suit land) by way of adverse possession and sought a determination of the following questions:
 1. Whether Caxton Nafula Nageri is the registered/administrator of all that parcel of land known as Bunyala/Bulemia/264 .
 2. Whether Benard Odoli Oballa purchased 4 acres in 1984 to be excised from the land parcel NO Bunyala/Bulemia/264 .
 3. Whether Benard Odoli Oballa has been in open, notorious, uninterrupted possession of the aforesaid 4 acres with consent and knowledge of Caxton Nafula Nageri and Joseph Nageri Nafula.
 4. Whether or not the open occupation by the plaintiff has matured into an adverse possession.Arising from the above issues, the Plaintiff sought judgment against the Defendant in the following terms:



- a. A declaration that the Plaintiff has acquired a portion measuring 4 acres out of parcel NO Bunyala/Bulemia/264 by adverse possession.
 - b. Costs.
2. The plaintiff filed a supporting affidavit dated September 2, 2021 as well as the statements of his witnesses Sylvanus Look Ojwang (PW2) and Cyril Anami Oballa (PW3) both dated 5th April 2022.
3. In his supporting affidavit, the plaintiff averred that in 1984, he purchased 4 acres out of the suit land from Joseph Nageri Nafula which was then registered in the name of his father the deceased. That the purchase price was Kshs.9,000 paid in three (3) instalments as follows:
 1. Kshs.5,000 on 30/5/1984.
 2. Kshs.3,200 (in the form of cattle) on 21/6/1984.
 3. Kshs.800 on 19/8/1985.

That Joseph Nageri Nafula acknowledged receipt of the purchase price by signing for the same. That the Plaintiff took possession of the suit land and started cultivating food crops such as maize, beans and millet. That the title of the deceased became extinguished at the expiry of 12 years from 1984 and therefore the Plaintiff has acquired by adverse possession ownership of the suit land.
4. In his statement, Sylvanus Look Ojwang (PW2) confirmed that he knows the parties herein and that in 1984, the plaintiff purchased 4 acres of land from Joseph Nafula Nageri the son to deceased. The witness confirmed further that he was the one who reduced the sale agreement in writing and that the plaintiff took possession of the suit land after paying the purchase price in full.
5. Cyrill Anami Oballa (PW3) also confirmed that sometime in 1985, he accompanied the plaintiff to pay the purchase price to the family of the deceased. That the plaintiff took possession of the land upto 2009 when the defendant started interfering with his occupation of the same. That the community recognises the plaintiff as the legitimate owner of the suit land.
6. The plaintiff also filed the following documents in support of his case:
 1. Register for the land parcel NO Bunyala/Bulemia/264 .
 2. Certificate of Search for the land parcel NO Bunyala/Bulemia/264 .
 3. Agreements for sale of land.
7. In opposing the plaintiff's claim, the defendant filed a replying affidavit in which he denied being the Administrator to the Estate of the deceased adding that he would apply to have the Originating Summons struck out as he has not taken out any Grant of Letters of Administration.
8. He added that the plaintiff entered into a sale agreement with Joseph Nageri Nafula who had no capacity to sell the suit land since he did not own it. That he does not know the plaintiff who has never occupied the suit land nor cultivated it but is instead living in Lugale miles away. That the suit land is a bush save for a small area.
9. The defendant filed statements of his witnesses Vincent Juma Abwoga (DW2) and Benslove Wandera Nageri (DW2) both dated September 14, 2022.



10. In his statement, Vincent Juma Abwoga states that he knows the parties and he has never seen the plaintiff cultivating the suit land. That he has been the chief of the area since 1994 upto 2005 and would have known if there was any land sale transaction. That the Plaintiff did not attend the deceased's burial and his claim to the suit land, if any, would have been disclosed to the deceased's family. That the people who had been allowed to cultivate the suit land were recognised at the deceased's burial.
11. On his part, Benslove Wanderi Nageri also stated that he resides on the suit land where he was born in 1973 and has never seen the plaintiff or his people cultivating it.
12. The plenary hearing commenced before Omollo J on June 13, 2022. She heard the plaintiff and his witnesses. Following her transfer, I heard the defendant and his witnesses. They all adopted as their testimony their respective affidavits and statements. The plaintiff produced as his documentary evidence the documents listed above.
13. Submissions were thereafter filed both by Mr Jumba instructed by the firm of Balongo & Company Advocates for the plaintiff and by Mr. J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Defendant.
14. I have considered the evidence by the parties and the submissions by counsel.
15. Before I delve into the evidence, I need to point out that although the defendant has been sued as the legal representative of the deceased, there was really no need to do so. This is because according to the Register of the suit land and which has been produced as part of the Plaintiff's documentary evidence, it was first registered in the names of the deceased on October 2, 1985. However, since August 31, 2019, it was registered in the defendant's names following succession proceeding. The Certificate of Official Search issued on February 1, 2021 confirm that the defendant is the current registered proprietor of the suit land. Mr J V Juma Counsel for the defendant has made the following submission on that issue:

“In the case, the Originating Summons discloses no cause of action against the respondent. The applicant cannot obtain a remedy in this honourable court from the Respondent since he is not an Administrator of the Estate of Nageri Nafula and this is to say that he has no locus standi in these proceedings. It is in plain white – the respondent has no locus and the Originating Summons has not exhibited any cause of action, therefore, the Originating Summons is defective and we pray the same to be struck.”

It is of course true that no document has been produced by either party to demonstrate that the defendant is the Legal Representative or the Administrator of the Estate of the deceased. It was therefore wrong to implead him as such because without the Grant of Letters of Administration a party cannot sue or be sued in respect of the Estate of a deceased person. Any suit filed by or against such a person in respect of the Estate would be incompetent and liable for striking out – *Otieno v Ougo* [1986 – 1989] EALR 460. See Also *Trouistik Union International & another v Jane Mbeyu & another* CA Civil Appeal No 145 of 1990.

16. However, as I have already stated above, the citing of the defendant as the legal representative of Nageri Nafula is simply an error which did not prejudice the Defendant nor go to the jurisdiction of this court. It is, in my view, curable by invoking the provisions of article 159(2)(d) of the Constitution. I therefore decline the invitation by counsel for the defendant to strike out this suit.
17. Having said so, the plaintiff seeks and order that he has acquired a portion of land measuring 4 acres out of the suit land. His case is that he went into occupation and took possession of the 4 acres following a sale agreement between him and Joseph Nageri Nafula the son to the deceased in 1984. Copies of the sale agreements have been produced. The defendant's case however is that there was no such sale of 4



acres of land to the plaintiff and if there was, then the said agreement was void ab-initio because Joseph Nageri Nafula had no capacity to do so. It is correct that Joseph Nageri Nafula had no right to sell the 4 acres or any portion of the suit land to the plaintiff or to any other person for that matter in 1984 because it was registered in the name of the deceased from October 2, 1985 upto August 31, 2019 when it was registered in the name of the Defendant. However, the plaintiff is not seeking to enforce that agreement. He has approached this court seeking an order that he be registered as the proprietor of 4 acres out of the suit land by virtue of having acquired it through adverse possession.

18. Section 38 of the *Limitation of Actions Act* allows a person who claims to have become entitled to land registered in the name of another person by way of adverse possession to apply to this Court for an order that he be registered as the owner of the land or lease in place of the registered proprietor. 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* CA Civil Appeal No 2136 of 1996. In *Kasuve v Mwaani Investments Ltd & others* CA Civil Appeal No 35 of 2002 ;[2004] 1 KLR 184 the Court stated that:

“ 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 the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa* (No 2) [1984] KLR 284. A title by adverse possession can be acquired under *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).”

A person claiming land by way of adverse possession must also demonstrate that his occupation and possession of the suit land is not by force, secrecy or persuasion (nec vi nec claim nec precario) – *Kimani Ruchine & another v Swift Rutherford & Co Ltd* [1980] KLR 10.

When he testified before Omollo J on June 13, 2022, the plaintiff told the Court that following the sale agreement, he took possession of the 4 acres in 1985 and cultivated it until the defendant stopped him in 2009. This is what he said in his evidence in chief:

“ I bought land from the deceased Joseph Nafulain 1984. We agreed the size sold was 4 acres at Kshs.9,000. I paid in instalments. The agreement was in writing with witnesses. I started using the land in 1985 by cultivating maize, beans etc. I stopped using the land in 2009 because the son of the deceased called Caxton stopped me from using it.”

The plaintiff’s testimony was corroborated by his witnesses Silvanus Look Ojwang (PW2) who said he drew the sale agreement dated May 26, 1984 and that the plaintiff cultivated it until 2009. This is what he said when cross-examined by MR. J. V. Juma:

“ The plaintiff cultivated the land from 1984 until 2009. I used to see him plant maize, millet and beans. The suit land is approximately 5km to my house in Mlukira. Currently, the plaintiff is not cultivating the land.”

On his part, Cyrill Anami Oballa (PW3) stated that he accompanied the plaintiff in 1985 when he(plaintiff) went to pay the last instalment of the purchase price.



19. On his part, the defendant not only insisted that his father Joseph Nageri Nafula had no authority to sell the suit land to the plaintiff but denied that the plaintiff had ever cultivated it. He however acknowledged that neither the deceased (who was his grandfather) nor Joseph Nageri Nafula (his father) had any issues with the Plaintiff upto the time they passed away. This is what he said when cross-examined by Mr. Jumba:

“The land in dispute used to belong to my grandfather Nafula Nageri. If my father Joseph Nageri Nafula was still alive, he is the one who would have taken out Letters of Administration for my grandfather’s Estate. In 1984, my grandfather was still alive. The land was still in his names. I am not aware about the agreement involving my father and the plaintiff for the purchase of this suit land. My father died in 2014. Prior to his death, I did not hear any dispute between him and the plaintiff over the land. Problems only started after my father passed away. I never heard any dispute. I did not know that my father had sold land to the plaintiff. The plaintiff was not living on the land.”

Although the defendant tried to feign ignorance about the sale agreement dated May 26, 1984 between his father and the plaintiff, I did not hear him claim that the said agreement which has the identity card details and signature of his father is a forgery. Indeed as is clear from paragraph 7 of his replying affidavit dated December 14, 2021, his complaint is “... that if the applicant entered into any sale agreement with Joseph Nageri Nafula over the suit land, then such an agreement was void ab initio as Joseph Nageri Nafula never owned the suit land and as such, had no capacity to sell the same or any part thereof.” But as I have already stated above, the plaintiff’s claim is hinged on adverse possession. He is not seeking to enforce the sale agreement. The defendant has also admitted that upto the time they died, both his deceased grandfather and father had no dispute with the plaintiff over the suit land. That can only mean that they both acknowledged the Plaintiff as a purchaser in possession. The documentary evidence shows that the Plaintiff paid the last instalment of the purchase price of Kshs.800 on August 19, 1985. That agreement which is signed both by the plaintiff and Joseph Nageri Nafula reads:

“RE: Sell Of Land

Today date 19/8/1985 we have brought Kenya Shillings Eight Hundred Only (Kshs.800) to pay money which remained to buy land plot No 264 measuring 4 Hectares).”

The reference to 4 Hectares must be an error because as is clear from the plaintiff’s own testimony, what he claims is 4 acres. And it is the law that a person in occupation of land after having paid the full purchase price is a person in whose favour time can run for purposes of adverse possession – *Public Trustee v Wanduru Ndegwa* CA Civil Appeal No 73 of 1982 [1984] eKLR. The plaintiff stated in cross-examination that:

“I live in Lugari in Bunyala South. Caxton chased me away from the land in 2009 saying I was a stranger.”

The defendant himself stated in cross-examination that:

“Problems only started after my father passed away.”

The only “problems” he could have been referring to must have been between him and the plaintiff and which must have culminated in the defendant stopping the plaintiff from continuing to cultivate the 4 acres purchased from the plaintiff’s deceased father and which transaction the defendant did not approve off. However, by 2009 when the plaintiff says he was chased away, he had been cultivating the said 4 acres for 25 years way in excess of the 12 years provided for in the law.



20. The defendant's witnesses appear not to have been very familiar with what transpired on the suit land. Vincent Juma Abwoga (DW2) was more concerned about the fact that the Plaintiff made no claim on the suit land during the deceased's burial. That in itself does not defeat the Plaintiff's claim. He even conceded that he was not the Administrator of the area in 1984 and in fact lives in Mundere Sub-location while the land in dispute is in Sishenge Sub-location. And whereas the defendant stated in paragraph 11 of his replying affidavit "that the suit land is mainly bush save for a small area which is inhabited", his witness Benslove Wandera Nangeri (DW3) said the following when cross-examined by Mr. Jumba:

"It is not true that the land in dispute is a forest."

And although both the defendant and Benslove Wandera Nangeri (DW3) claimed in their replying affidavit and statement respectively that they live on the suit land, no evidence of any homes were availed. The plaintiff on the other hand is not claiming the 4 acres on the basis of having lived there. His case is that having taken possession of the 4 acres in 1984, he started cultivating maize, beans and millet upto 2009 when the defendant chased him away. Cultivation of land is sufficient to prove a claim of adverse possession so long as the requisite 12 years period is established. In *Joseph Macharia Mwangi v Jonah Kabiru S/o Kabuthi* CA Civil Appeal No 141 of 2009 (2013) eKLR, the Court said:

"It is important to emphasize that where possession is predicated on the fact of cultivation, it must be shown clearly that the claimant openly and continuously, from season to season, cultivated and had control of the land for 12 years or more with the knowledge of the owner but without the owner's permission or consent."

The plaintiff, as I have already found above, cultivated the 4 acres from 1984 to 2009 when his occupation was interrupted by the defendant. By that time, however, his title to 4 acres out of the suit land had long been extinguished by operation of the law. And although the defendant was only registered as the proprietor of the suit land on August 31, 2019, that change of ownership did not interrupt the Plaintiff's adverse possession either – *Gitbu v Ndeete* 1984 KLR 776.

21. From my evaluation of the evidence herein, I am satisfied that the Plaintiff has proved entitlement to 4 acres out of the land parcel NO Bunyala/Bulemia/264 by way of adverse possession.
22. Even assuming that the Plaintiff had not proved his claim to the 4 acres by way of adverse possession, this Court would still have been prepared to find in his favour on the basis of a constructive trust even though the same was not pleaded. This is because as was held in *Twalib Hatayan Twalib Hatayan & another v Said Ahmed Al-beidy & others* 2015 eKLR, by the Court of Appeal:

"A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (*supra*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit

As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment" Emphasis mine.

As is clear from the above, a constructive trust is imposed by the court in order to do justice to the parties and guard against the unjust and inequitable result that would follow if the same is not imposed



by the court. In the circumstances of this case, it is not in dispute that the Plaintiff fully paid for the purchase price of the 4 acres albeit to a person who was not then registered as the proprietor of the suit land. He however took occupation and possession of the 4 acres which he utilized during the life time of both the registered proprietor Nafula Nageri and his son the vendor Joseph Nageri Nafula. Both of them did not, prior to their demise, raise any issues with the plaintiff over his occupation and possession of the said 4 acres. It would be an-unmitigated act of injustice for the Plaintiff to loose both the purchase price and the 4 acres yet both the Constitution 2010 under article 60(1), the Environment and Land Court Act vide section 18 and the Judicative Act vide section 3(c) espouse the courts to apply the doctrines of equity in application of the law. This is one such case.

23. The up-shot of all the above is that having considered the evidence by all the parties, there shall be judgment for the plaintiff against the defendant in the following terms:
1. The plaintiff has acquired by way of adverse possession a portion of land measuring 4 acres out of the land parcel NO Bunyala/Bulemia/264 .
 2. The defendant's ownership of a portion of land measuring 4 acres out of the land parcel NO Bunyala/Bulemia/264 has been extinguished by operation of the law.
 3. The Land Registrar and County Surveyor Busia shall demarcate a portion measuring 4 acres out of the land parcel NO Bunyala/Bulemia/264 and the same shall be registered in the name of the Plaintiff.
 4. As much as possible, the 4 acres should include the portion which the Plaintiff used to cultivate before he was evicted in 2009.
 5. The Defendant shall within 30 days of this judgment execute all the relevant documents to facilitate that registration and surrender the original title deed for parcel No Bunyala/Bulemia/264 to the Land Registrar Busia for cancellation.
 6. In default of (5) above, the Deputy Registrar of this court shall be at liberty to execute all such documents on behalf of the Defendant and the Land Registrar shall cancel the title to the land parcel No Bunyala/Bulemia/264 from the Register notwithstanding the absence of the original title deed.
 7. The plaintiff shall meet the costs of sub-division and registration.
 8. The defendant shall meet the costs of the suit.

BOAZ N. OLAO

JUDGE

9TH MARCH 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 9TH DAY OF MARCH 2023 AT BUSIA ELC BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 6TH FEBRUARY 2023. RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

9TH MARCH 2023

