



**Otieno v Odote & another (Environment & Land Case 02 of 2021)  
[2023] KEELC 20622 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 02 OF 2021  
E ASATI, J  
OCTOBER 12, 2023**

**BETWEEN**

**ROSE AKELLO OTIENO ..... PLAINTIFF**

**AND**

**JOSEPH ODOTE ..... 1<sup>ST</sup> DEFENDANT**

**PETER ONYANGO ODOTE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Rose Akello Otieno, the plaintiff herein vide the Originating Summons dated 8<sup>th</sup> October, 2012 stated to be brought pursuant to the provisions of order 37, rules 3 and 7 of the *Civil Procedure Rules* (cap 21, Laws of Kenya) and the *Registered Land Act* No.3 of 2012 sought the following relief against the Defendants herein;
  - a. That the Respondents, their agent, representatives, employees, servants and/or assigns be restrained by a permanent order of injunction from interfering, alienating sub-dividing, evicting and or threatening the peaceful occupation of the Applicant's portion and or do anything whatsoever on a portion occupied by the Applicant on West Bunyore/Ekwanda/1606 pending inter partes hearing.
  - b. That the Respondents Joseph Odote and Peter Onyango Odote be ordered to execute all documents of transfer in respect of the said portion of land West Bunyore/Ekwanda/1606 in favour of the Applicant failure to which authorize Court officer of the Honourable court empowered to execute the same in place of the Respondents.



- c. That the applicant be declared the absolute owner of that portion on piece of land known as WEST Bunyore/Ekwanda/1606 which parcel she has cultivated and has been in actual possession of peacefully, openly and uninterrupted for a period of over 33 years since 1978.
  - d. That the honourable court do issue preservatory order directing the District Land Registrar Vihiga to stop any dealing and/or transactions in the entries of the register relating to land parcel No. West Bunyore/Ekwanda/1606.
  - e. That the court do issue such further orders of relief it deems fit and just expedient.
  - f. That the costs of the Application be awarded to the Applicant.
2. The Respondents, in reply to the Originating Summons, filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent, Peter Onyango Odote on 26.11.2012, on his own behalf and on behalf of the 1<sup>st</sup> Respondent. During the hearing, it was indicated to the court that the 1<sup>st</sup> Defendant passed on in the course of the proceedings.
  3. Directions on the Originating Summons pursuant to the provisions of order 37 rules 16, 17, 18 and 19 of *Civil Procedure Rules*, 2010 were taken on 13<sup>th</sup> October, 2014 that the Applicant be treated as the Plaintiff, the Respondents as the Defendants, the matter to proceed by way of oral evidence and that parties file witness statements, if necessary.
  4. At first the matter had proceeded exparte and judgment dated 8<sup>th</sup> March 2022 rendered in favour of the Plaintiff. Soon thereafter and before the judgement could be- executed the 2<sup>nd</sup> Defendant applied for setting aside of the judgement and orders emanating from the judgement. By consent of counsel for the parties entered into on 7<sup>th</sup> February 2023 the judgement dated 8/3/2022 was set aside, witnesses who had testified on behalf of the plaintiff recalled for purposes of cross examination only by the Defendant and the Defendant allowed to present his case.

#### **The Plaintiff's case.**

5. The plaintiff contends that she has acquired title to a portion of land parcel known as West Bunyore/Ekwanda/1606(the suit land herein) by operation of the doctrine of adverse possession. Her case is contained in the Originating Summons, Affidavit in support of the Originating Summons sworn by the plaintiff on 8<sup>th</sup> October, 2012, her testimony in court and the testimony of PW2 and the exhibits she produced. She claims that she bought a portion of the suit land from the 1<sup>st</sup> Defendant. That she has been in actual possession of the purchased portion since the year 1978 to date, cultivating the same uninterrupted and enjoying peaceful use of the same. That payment of the purchase price was made by the plaintiff and her late husband one George Otieno. That the 1<sup>st</sup> Defendant who is the father of the 2<sup>nd</sup> defendant secretly transferred the whole of the suit land to the 2<sup>nd</sup> Defendant without taking into account the Plaintiff's share. That the 2<sup>nd</sup> Defendant has refused to transfer the purchased portion to the Plaintiff and instead is threatening to forcefully evict the Plaintiff from the suit land. That the Defendant had destroyed crops cultivated on the purchased portion of land and made a road through the said portion of land. In court she testified that the portion she and her husband bought is described in the land sale agreement dated 11.1.1994. She produced an agreement dated 11.1.1994 written in dholuo language and its English transaction as exhibit 1 (a) and 1 (b) respectively. She also produced a copy of the Green Card in respect of the suit land as exhibit 2. She testified that she obtained an order from Kakamega High Court against the Defendants.
6. On cross examination by M/S Rabote Counsel for the Defendant, the Plaintiff stated that the suit land was land parcel No. W. Bunyore/Ekwanda/1606. That her late husband Washington Otieno had



- bought a portion of the suit land measuring  $\frac{3}{4}$  of an acre from the 1<sup>st</sup> Defendant. That she also owns land parcel number W. Bunyore/Ekwanda/1116 which she bought in the year 1978. She denied ever trespassing onto the suit land. That she occupied and has been cultivating the sold portion of the suit land. That her husband died in the year 1991 by which time she was already cultivating the land. That she bought another piece of land from one Justo who is a brother to the 1<sup>st</sup> Defendant. That it was the 2<sup>nd</sup> Defendant who destroyed the boundary that existed between the land of Justo and that of the suit land.
7. And in re-examination she stated that they first bought a piece of land from Justo then the 1<sup>st</sup> Defendant who was unwell approached them to buy land from him so he could get money for medication. That she developed the two pieces as one land. That in the year 2010 the 2<sup>nd</sup> Defendant begun to disturb her whereupon she filed suit and the court issued orders restraining him from disturbing her pending determination of the suit. That her portion of the suit land is fenced and delineated.
  8. PW 2, a daughter of the Plaintiff, supported the Plaintiff's case and testified that the Defendants are her neighbors at home and that she grew up tilling a portion of the suit land. That the portion was bought by her late father from the 1<sup>st</sup> Defendant. That her mother later added the seller some money. She added that since December, 2012 to date it is Onyango who is using the land and she prays that he be restrained.
  9. On cross examination, she stated that when she went home in the year 1979, she found her parents already cultivating the suit land. That the land was transferred to the 2<sup>nd</sup> Defendant in the year 2011 or 2012. That the piece of land that her father bought from the 1<sup>st</sup> Defendant was slightly less than 1 acre.
  10. And on re-examination she stated that the 2<sup>nd</sup> Defendant tried to interfere with the boundary around the time he became registered owner on 20/9/2011. That by the time the suit was filed, it was the Plaintiff who was using the land. That the 2<sup>nd</sup> Defendant started interfering thereafter and destroyed crops.

#### **The Defence case.**

11. The Replying Affidavit sworn by the 2<sup>nd</sup> Defendant on 26<sup>th</sup> November, 2012 was vide the court directions taken on 13.10.2014 deemed to be the Defence. The 2<sup>nd</sup> Defendant testified as DW1. He adopted the contents of the Replying Affidavit sworn on 26/11/2012 as his evidence. In the Replying Affidavit he had deposed that the 1<sup>st</sup> Defendant was his father. That the plaintiff did not purchase any portion of the suit land. That his father did not know how to read and write hence the agreement was a forged document. That the plaintiff purchased land from the paternal uncle of the 2<sup>nd</sup> Defendant that the plaintiff interfered with the common boundary and that when the Land Registrar together with the land surveyor came to realign the boundary it was noted that the plaintiff had trespassed onto his (2<sup>nd</sup> Defendant's) land. That the plaintiff had never been in actual possession of or even cultivated any portion of the land and that if there was any cultivation by the Defendant then that was due to interference with the common boundary. That the 1<sup>st</sup> Defendant never received any purchase price from the Plaintiff or her husband and that there is no agreement between the Defendants and the Plaintiff's late husband. That the 1<sup>st</sup> Defendant transferred the suit land into his (2<sup>nd</sup> Defendant's) name after obtaining consent of the Land Control Board. That the Plaintiff is trying to enforce an invalid contract by claiming adverse possession. That the applicant has been trespassing on the suit land until she was stopped by the Land Registrar upon realignment of the boundary. That the Plaintiff has lied to the court that she started occupying the land in the year 1978 while the truth is that she never occupied the suit land



12. The 2<sup>nd</sup> Defendant deposed further that him and his family reside on the suit land where they have constructed their houses and are in actual use while the Plaintiff resides elsewhere but cultivates a portion of the land she purchased from the 2<sup>nd</sup> Defendant's uncle which borders the suit land. That if the plaintiff had been in occupation since 1978, the claim is defeated by the statute of limitation. That the plaintiff has failed to fulfill the conditions precedent to the grant of adverse possession.

### Submissions

13. The Plaintiff through her advocates on record namely: Chitwah and Company Advocates filed written submissions dated 12<sup>th</sup> July 2023. Relying on sections 7, 13 and 38 of the act/1968/21 *Limitation of Actions Act*, Counsel for the Plaintiff submitted that the doctrine of adverse possession is one of the ways of land acquisition in Kenya. That the combined effect of those provisions of law is to extinguish the title of a proprietor of land in favour of the adverse possessor at the expiry of 12 years of occupation. Counsel also relied on the provisions of section 28 of the *Land Registration Act* to demonstrate that adverse possession is an overriding interest.
14. He further submitted that the key test is that the owner of the land must have been disposed or has discontinued possession of the property.
- That the Plaintiff has acquired rights over the suit land because she has had possession of the same since the year 1978 to date with the full knowledge of the Defendant. Further that her evidence has not been rebutted.
- The Plaintiff relies on the cases of *Kasuve v Mwaani Investments Limited and 4 others* 1 KLR 184, *Kweyu v Omutu* CA Civil Appeal No. 8 f 1990(unreported) and *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & another* [2015] eKLR to support the submissions.
15. Written submissions dated 10<sup>th</sup> July 2023 were filed on behalf of the Defendant by the firm of Mukabi & Co. Advocates. Counsel submitted that the three tests of adverse possession claim are that one must have occupied the land to the exclusion of others, the occupation must be without the consent of the owner and the occupation must be for a continuous and uninterrupted period of of at least twelve years. Counsel relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandu* [2015]- KLR. Counsel submitted that what the plaintiff produced to show that her husband bought the land was an agreement that did not indicate what the exchange of money was meant for neither does it show exactly what was being paid for. That the 2<sup>nd</sup> Defendant produced a national identification card to prove that the 1<sup>st</sup> Defendant was illiterate and could not write that therefore the agreement that is produced in court is a forgery as it shows that the 1<sup>st</sup> Defendant signed the produced agreement.
16. That in case the court considers the agreement to be valid, then the question would be what was paid for and when was the last instalment made. Counsel relied on the case of *Wilfred Kegonye Babu v Henry Mose Onuko* (2019) eKLR to submit that time begins to run from the date of the last payment of the purchase price. That the question in the present case is whether the last instalment of the purchase price was paid. That since the last instalment of the purchase price of Kshs 3000 was never paid, time never begun to run.
17. Counsel submitted further that the dispute between the parties was rather on the issue of the boundary than adverse possession as the plaintiff had previously acquired land from a brother of the 1<sup>st</sup> Defendant and it happened that the suit parcel of land and the other parcel bought by the plaintiff borders one another and that would easily have been settled by a surveyor as an expert of defining boundaries.



18. Counsel submitted further that possession and occupation of the suit land is the lifeline of a claim of adverse possession and the same must be proved to the required degree in order for a claim of adverse possession to succeed. That where the claim is for only part of the suit land, the size of the claimed portion is a material fact which should be pleaded and proved. Counsel relied on the case of *Gatimu Kinguru v Muya Gathangi* (1976) KLR 253 to support the submission. Counsel submitted that the agreement produced in court does not indicate the size of the sold land. That the pleadings filed do not mention the size of the land claimed. That the size is not clear from the evidence. That no evidence was adduced to at least identify the portion with a clear boundary.
19. Counsel concluded that the plaintiff did not prove her claim of adverse possession and prayed that the 2<sup>nd</sup> Defendant be declared as the rightful owner of the whole of the suit land.

### **Issues for determination**

20. From the pleadings filed, the evidence adduced and the submissions made the following emerge as the issues for determination herein
  - a. How much of the suit land does the plaintiff claim.
  - b. Whether or not the title of the registered owner of the suit land has been extinguished by effluxion of time in respect of the claimed portion.
  - c. Whether or not the plaintiff has acquired title to the claimed portion of the suit land.
  - d. Whether or not the plaintiff is entitled to transfer and registration of the claimed portion of the suit land in her favour.
  - e. Costs of the suit.

### **The Applicable law**

21. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

“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.”

Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this *Act* referred to as adverse possession), 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.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.



- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

The procedure for seeking relief on a claim based on adverse is provided for in section 38 of the Limitation of Actions Act and order 37 of the Civil Procedure Rules, 2010

Section 38 (1) provides;

- (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
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

And order 37 Civil Procedure Rules provides

- “(1) An Application under section 38 of the Limitation of Actions Act shall be made by Originating Summons
- (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

Article 162(2) of the Constitution of Kenya 2010, section 13 of the Environment and Land Court Act and section 38 of the Limitation of actions Act confer jurisdiction on this court to handle claims premised on adverse possession.

### **Analysis and Determination**

22. The first issue for determination is how much of the suit land does the plaintiff claim. In the Originating Summons, the Plaintiff pleaded that she “claims to have acquired by way of adverse possession land parcel West Bunyore/Ekwanda/1606\_ a portion thereof.” In prayer 3 of the Originating Summons she prayed to be declared absolute owner of that portion on piece of land known as West Bunyore/Ekwanda/1606 which parcel of land she has cultivated and has been in actual possession of..... In paragraph 2 of her Affidavit in Support of Originating Summons, she stated that “I bought a portion of land from parcel number West Bunyore/Ekwand/1606 from Joseph Odote...” It is in her evidence that she stated that the portion of land bought measures about  $\frac{3}{4}$  of an acre. She stated that the actual measurements of the land were not taken. PW2, the plaintiff’s daughter testified that there is a demarcation separating the portion claimed by her mother and the land remaining for the seller. The Defendant claimed that the Plaintiff had encroached to his land but did not disclose the extent of the encroachment. I find that the plaintiff is consistent that she only bought a portion of the suit land measuring  $\frac{3}{4}$  of an acre which she occupied and utilized,
23. The next issue is whether the title of the registered owner in respect of the claimed portion had been extinguished by effluxion of time. Under section 7 of the Limitation of Actions Act, no claim can be brought for the recovery of land after expiry of 12 years from the date the cause of action arose. As at the time of the Plaintiff’s entry onto the suit land, the suit land was registered in the name of the 1<sup>st</sup> Defendant. The Plaintiff testified that her plea to the 1<sup>st</sup> Defendant to transfer to her the portion she had bought were futile and instead, the 1<sup>st</sup> Defendant secretly transferred the whole of the suit land to the 2<sup>nd</sup> Defendant with a view to denying the Plaintiff the sold portion. Perusal of exhibit 2, the copy of register, shows that the register in respect of the suit land was opened on 22.10.1970 in



the name of Odote Ochieng'. It shows further that on 1.8.2011 a change of name was registered from Odote Ochieng' to Joseph Odote Ochieng'. On 20.9.2011 the land was transferred in favour of the 2<sup>nd</sup> Defendant.

Time begun to run in favour of the Plaintiff in the year 1995 when the last payment of the purchase price was made. This means that by the year 2011 when the land was transferred in favour of the 2<sup>nd</sup> Defendant, the Plaintiff had 16 years as an adverse possessor. The cause of action had accrued to the 2<sup>nd</sup> Defendant's father to evict or demand for vacant possession from the Plaintiff 16 years before the land was transferred to the present Defendant. The 1<sup>st</sup> Defendant did nothing to assert his rights.

24. I find that as at the time the suit land was transferred to the present Defendant, the original owner's title had been extinguished and the land was subject to an overriding interest in the form of a claim of adverse possession to the extent of the claimed portion in terms of section 28 of the [Land Registration Act](#). Section 28 provides:

'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 in the register-

- a. ....
- b. ....
- c. ....
- d. ....
- e. ....
- f. ....
- g. ....
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.

In [James Obande Wasui v Jeremiah Ochwada Musumba](#) [2002]eKLR the court held that as an occupier's right, adverse possession runs with the land irrespective of change in proprietorship.

I further find that the adverse possession rights were not terminated by reason of transfer of the suit land from the original registered owner to the 2<sup>nd</sup> Defendant.

25. The next issue for determination is whether or not the plaintiff has acquired title to the claimed portion of the suit land by adverse possession. In order for a claim of adverse possession to succeed, the plaintiff need must prove that her possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In [Kimani Ruchure v Swift Rutherford & Co. Ltd](#) (1980)KLR 10 Kneller J held that "the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)

26. In the case of [Gabriel Mbui v Mukindia Maranya](#) [1993]eKLR adverse possession was defined as

"..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of



possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it."

In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR the court of Appeal defined adverse possession as:

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

27. The Plaintiff's evidence is that she entered the suit land in the year 1978 after her and her husband purchased a portion of the suit land from the 1<sup>st</sup> Defendant. PW2, who is a daughter to the Plaintiff testified that her mother the plaintiff had been on the suit land since it was bought. Entry onto land by a purchaser on the basis of a land sale agreement can mature into adverse possession if the sale transaction is not completed. The Court of Appeal in Kisumu App. No 82 of 2014 *Wilfred Kegonye Babu v Henry Mose Onuko* [2019] eKLR quoting from *Wambugu v Njuguna* [1983]KLR 172 held that

"where the claimant is a purchaser under a contract of sale of land.... The possession can only therefore become adverse once the contract is repudiated."

The court further stated that

"where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment."

In *Catthy Alucia Jebor Kiplagat v Vincent Komen Krelnut* [2018 eKLR the court held that Adverse possession can be claimed where registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.

Also in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR relied on in *Public Trustee v Wanduru*, 1984 KLR 314 the Court stated that

"adverse should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run."

28. The Plaintiff's evidence was that upon entry onto the sold portion of the suit land she took possession and had been cultivating it peacefully and uninterrupted. PW2 testified that they have been tilling the portion of land since she was a child. The Plaintiff produced an agreement acknowledging receipt of payment as exhibit P 1(a) and its translation as exhibit P1(b). Though the same is dated 11.1.1994, it contains record of acknowledgement of further payments made on 24.2.1995 and 2.4.1995.



From exhibit P1 (a) and P1 (b), the last payment of the purchase price was done on 2. 4.1995. That is the date when time begun to run in favour of the Plaintiff. Since 2.4.1995 up to the time the suit was filed in the year 2012 a period of approximately 17 years had elapsed. The plaintiff's occupation of the suit land satisfied the prescribed period of 12 years.

29. The Defendant's position was that the plaintiff has never had occupation of the suit land. That what the plaintiff occupies is a neighboring land that she bought from the Defendant's uncle by the name Justo. That there arose a boundary dispute when the plaintiff encroached onto the suit land but that she was stopped by the Land Registrar who realigned the boundary. No report of the Land Registrar or any evidence was exhibited to support this claim.
30. The Plaintiff, on the other hand, states in her Affidavit in Support of Originating Summons that since she entered the suit land in the year 1978, she had had peaceful occupation and use thereof up to the time of filing suit. In court she stated that although the 1<sup>st</sup> Defendant refused to transfer the sold portion to her and instead transferred the whole of the suit land to the 2<sup>nd</sup> Defendant, she remained in occupation. That she used to plant maize on the suit land. She produced a copy of register which shows that the suit land was transferred in favour of the 2<sup>nd</sup> Defendant on 20.9.2011. In paragraphs 8 and 9 of the Affidavit in Support of Originating Summons she deposed that the 2<sup>nd</sup> Defendant had threatened actual physical violence towards her by intimidating her. That the Defendants had further threatened to evict her forcefully from her peaceful occupation of the portion. She testified that she obtained an order from Kakamega High Court against the Defendants. PW2 testified that the 2<sup>nd</sup> Defendant is occupying the land since 2012 and prayed that he may be restrained. The question is when and how did he enter the suit land yet there was a court order in place? Advocate Chitwah submitted that contemporaneous to the filing of the Originating Summons the plaintiff filed an application under certificate of urgency on which the court issued orders restraining the Defendants from dealing with the land until the suit is heard.
31. My perusal of the court file indeed reveals that alongside the Originating Summons, the Plaintiff filed a Notice of Motion Application dated 8. 10. 2012 seeking for injunctive and preservative orders. The record further shows that when the Notice of Motion came up for hearing inter partes, an Assistant Chief of the area where the land is situate was called by the court to clarify on the status quo then obtaining on the land. The court record shows further that on 17.12.2012, after hearing the said area Assistant Chief, the court made an order that:

“the status quo as per the report of the Assistant Chief to remain, pending hearing and determination of the application. That is, each party to continue occupying the portion of the land that they currently occupy as detailed assistant chief's report.”

As at the time this court order was issued the Plaintiff was in occupation. That is the status quo that the court preserved.

In *Gitbu v Ndeete* [1994] KLR quoted by the Court of Appeal in *Kenya Commercial Bank (suing as Administrator of the Estate of Paul Njoroge Muchene) v Sarah Njeri Muchene* the court held that:

“time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of actions Act*.”



A title by adverse possession can be acquired under the *Limitation of actions Act* to a part of the parcel of land to which the owner holds title.”

In the current case it cannot be said that the owner asserted his rights when there was a court order preserving the status quo. On 7/2/2023 the defendant undertook to abide by the order by restraining himself from the disputed portion of the suit land.

### Costs

32. Although under section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event, in the circumstances of this case namely that the parties are neighbours it is in the interest of justice that each party bears own costs.

### Conclusion

33. From the above analysis, the court concludes that Plaintiff has proved firstly, that although she entered the suit land on the basis of a land sale agreement her continued stay on the land after the Seller, the 1<sup>st</sup> Defendant, failed to complete the sale transaction was open, actual peaceful, continuous and exclusive. The same was with the knowledge but without the consent or permission of the 1<sup>st</sup> defendant. Secondly, that transfer of the suit land in favour of the 2<sup>nd</sup> Defendant neither stopped time from running in favour of the Plaintiff nor extinguished rights of adverse possession already acquired by the Plaintiff. Thirdly that the 2<sup>nd</sup> Defendant’s entry onto the suit land after court issued order preserving status quo did not have the effect of extinguishing the rights already acquired by the Plaintiff over the suit land. On the basis of these conclusions, I find that the Plaintiff has proved her case on a balance of probabilities and enter judgment in her favour for:

- i. A declaration that the plaintiff has acquired title to a portion of land measuring  $\frac{3}{4}$  of an acre of land known as West Bunyore/Ekwanda/1606 by virtue of having been in adverse possession thereof.
- ii. A declaration that the 1<sup>st</sup> Defendant’s title to the portion measuring  $\frac{3}{4}$  of the suit land had been extinguished by effluxion of time and that the 2<sup>nd</sup> Defendant’s title thereto is subject to the overriding interest of adverse possession by the plaintiff.
- iii. An order for transfer by the 2<sup>nd</sup> defendant of the portion measuring  $\frac{3}{4}$  of an acre of land parcel W. Bunyore/Ekwanda/1606 in favour of the plaintiff. In default the Deputy Registrar of the court to execute the requisite documents so as to effect the transfer.
- iv. An order restraining the 2<sup>nd</sup> Defendant by himself, his agents, representatives, employees, servants and/or assigns from in any manner whatsoever interfering with the Plaintiff’s possession or occupation of the portion measuring  $\frac{3}{4}$  of an acre of land parcel number West Bunyore/Ekwanda/1606.
- v. Each party to bear its own costs.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,  
JUDGE.**



In the presence of:

Ajevi-Court Assistant.

No appearance for the Plaintiff.

Rabote- for the 2<sup>nd</sup> Defendant.

